

1

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF SOUTH DAKOTA

3 SOUTHERN DIVISION

4 -----

5 Courtney Jayne, Individually and
6 as Personal Representative of the
Estate of M.Z.,

7 Plaintiff,

8 vs. Case No. 4:18-CV-4088-KES

9 City of Sioux Falls,

10 Defendant.

11 -----

12

13

14 DEPOSITION OF KENNETH NEMIRE, Ph.D., CPE

15 VOLUME I, PAGES 1 - 241

16 AUGUST 20, 2019

17

18 (The following is the deposition of KENNETH

19 NEMIRE, Ph.D., CPE, taken pursuant to Notice of

20 Taking Deposition, via videotape, at Robins Kaplan,

21 LLP, 800 LaSalle Avenue, Suite 2800, in the City of

22 Minneapolis, State of Minnesota, commencing at

23 approximately 9:03 o'clock a.m., August 20, 2019.)

24

25

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

1 PROCEEDINGS

2 (Nemire Exhibits 1-2 marked for

09:03:56 3 identification.)

09:03:56 4 (Witness sworn.)

5 KENNETH NEMIRE, Ph.D., CPE,

6 Called as a witness, being first

7 duly sworn, was examined and

8 testified as follows:

9 EXAMINATION

10 BY MR. SIEFF:

09:04:11 11 Q. State your name for the record, please.

09:04:12 12 A. Kenneth Nemire.

09:04:15 13 Q. And you are a -- hold a Ph.D.; is that

09:04:18 14 correct?

09:04:19 15 A. That's correct.

09:04:20 16 Q. That Ph.D. is in experimental psychology; is

09:04:23 17 that correct?

09:04:23 18 A. Yes.

09:04:24 19 Q. You received your Ph.D. from The University

09:04:27 20 of California in Santa Cruz?

09:04:30 21 A. Yes.

09:04:30 22 Q. You also hold a Bachelor of Sciences in

09:04:34 23 something called psychobiology; is that correct?

09:04:37 24 A. Yes.

09:04:37 25 Q. You are not a medical doctor; correct?

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

2

1 APPEARANCES:

2 On Behalf of the Plaintiff:

3 Philip Sieff

4 Patricia Yoedicke

5 ROBINS KAPLAN LLP

6 800 LaSalle Avenue

7 Suite 2800

8 Minneapolis, Minnesota 55402-2015

9 On Behalf of the Defendant:

10 James E. Moore

11 Woods, Fuller, Shultz & Smith, P.C.

12 P.O. Box 5027

13 300 South Phillips Avenue

14 Suite 300

15 Sioux Falls, South Dakota 57117-5027

16 ALSO PRESENT:

17 Ronald M. Huber, Videographer

18

19 EXAMINATION INDEX

20 WITNESS EXAMINED BY PAGE

21 Dr. Nemire Mr. Sieff 3

22 EXHIBIT INDEX

23 EXHIBIT DESCRIPTION PAGE

24 Nemire

25 1 Kenneth Nemire, CV, Oct. 26, 2018, 3

Jan. 31, 2019, 7 pgs.

2 Nemire Report, HUMAN FACTORS 3

ANALYSES OF A FALL AND DROWNING IN

3 A RIVER AT FALLS PARK, SIOUX FALLS,

4 SOUTH DAKOTA, 34 pgs.

5 Photo, 1 pg. 234

6 email, Hall to Kirkus, Kearney and 236

7 Leonard, Aug. 26, 2018, with

8 attached photo, 2 pgs.

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

4

09:04:39 1 A. That's correct.

09:04:40 2 Q. All right. Dr. Nemire, you are testifying

09:04:46 3 today on behalf of the defendant, the City of Sioux

09:04:49 4 Falls; is that correct?

09:04:50 5 A. Yes.

09:04:51 6 Q. You were hired to do so by the City of Sioux

09:04:54 7 Falls and its attorney, Mr. Moore; --

09:04:56 8 A. Yes.

09:04:57 9 Q. -- is that correct?

09:04:58 10 "Yes"?

09:04:59 11 A. Yes.

09:05:00 12 Q. Did you bring your file with you today?

09:05:02 13 A. Yes.

09:05:03 14 Q. Whereabouts is it?

09:05:04 15 A. In front of me.

09:05:05 16 Q. All right. We'll take a look at that in a

09:05:08 17 minute.

09:05:09 18 You're familiar with the deposition process;

09:05:11 19 is that correct?

09:05:12 20 A. Yes.

09:05:13 21 Q. You've testified approximately 110 times in

09:05:16 22 the past four years; does that sound about right?

09:05:19 23 A. Four years?

09:05:20 24 Q. Yes.

09:05:20 25 A. No.

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

09:22:44 **1** that there is can be common sense, so-called
 09:22:47 **2** common-sense knowledge that is inaccurate for any
 09:22:52 **3** number of reasons.
 09:22:54 **4** **Q.** Is it your testimony that a human factors
 09:22:57 **5** expert has greater expertise in common sense than a
 09:23:01 **6** juror in Sioux Falls, South Dakota?
 09:23:07 **7** **A.** Common sense has a number of different
 09:23:10 **8** definitions. Common sense can be correct, it can be
 09:23:16 **9** not correct, and there are some issues that might be
 09:23:22 **10** considered common sensical, but in fact the common
 09:23:31 **11** sense understanding of an issue is -- is incorrect,
 09:23:35 **12** according to scientific evidence.
 09:23:39 **13** **Q.** You testified that your purpose here today
 09:23:41 **14** is to educate the jury regarding human factors issues
 09:23:44 **15** present in this case. In doing so, would you agree
 09:23:48 **16** that it's necessary and vital for you to respect the
 09:23:52 **17** role of the Court in these proceedings; the judge?
 09:23:58 **18** **A.** Yes.
 09:24:00 **19** **Q.** Would you agree that as part of your purpose
 09:24:05 **20** in educating the jury regarding human factors issues
 09:24:08 **21** present in this case that it's important, if not
 09:24:12 **22** vital, that you respect the role of the jurors in this
 09:24:15 **23** case?
 09:24:16 **24** **A.** Yes.
 09:24:22 **25** **Q.** And respect the role that the law itself may
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

18

09:24:24 **1** play in this case.
 09:24:25 **2** **A.** Yes.
 09:24:38 **3** **Q.** You have written a detailed report regarding
 09:24:42 **4** your findings in this case and your opinions; true?
 09:24:47 **5** **A.** Yes.
 09:24:48 **6** **Q.** And we will get to that in a moment in some
 09:24:51 **7** detail, but before we do that I have one question for
 09:24:55 **8** you. In arriving at your opinions did you make any
 09:25:00 **9** judgements as to the credibility of any of the
 09:25:02 **10** evidence that you reviewed?
 09:25:08 **11** **A.** Yes.
 09:25:09 **12** **Q.** Tell me, which ones?
 09:25:12 **13** **A.** I evaluate all the pieces of evidence that
 09:25:16 **14** come before me to evaluate which would be -- would be
 09:25:24 **15** useful in me understanding how an incident occurred
 09:25:30 **16** and what might have prevented the incident.
 09:25:34 **17** **Q.** In the course of conducting your
 09:25:37 **18** investigation, reaching your findings and opinions,
 09:25:40 **19** did you make any judgements as to the credibility of
 09:25:43 **20** any testimony of any witness in this matter?
 09:25:48 **21** **A.** Yes.
 09:25:49 **22** **Q.** Who?
 09:25:51 **23** **A.** All the deposition transcripts and all the
 09:25:54 **24** statements that I read, I always evaluate statements
 09:26:00 **25** or descriptions that may appear correct or may appear
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

09:26:06 **1** not correct or suspect in some way.
 09:26:11 **2** **Q.** Are you able to identify each and every
 09:26:14 **3** decision with respect to the credibility of witness
 09:26:18 **4** testimony in this case that you have made?
 09:26:22 **5** **A.** I'm sorry. Ask the question again.
 09:26:23 **6** **Q.** Are you able to tell us each piece of
 09:26:26 **7** witness testimony that you have judged to either be
 09:26:30 **8** credible or, more importantly, not credible?
 09:26:34 **9** **A.** We would have to walk through every
 09:26:36 **10** statement made and all the transcripts and all the
 09:26:40 **11** statements to the police.
 09:26:41 **12** **Q.** So you've --
 09:26:42 **13** Is it fair to say that you have made
 09:26:45 **14** determinations as to the credibility of witness
 09:26:48 **15** statements in this case in more than one instance?
 09:26:53 **16** **A.** Yes.
 09:26:54 **17** **Q.** More than two instances?
 09:26:56 **18** **A.** Yes.
 09:26:57 **19** **Q.** Many, many instances.
 09:26:59 **20** **A.** Most likely.
 09:27:00 **21** **Q.** You have determined the credibility of a
 09:27:03 **22** witness testimony in this case based upon written
 09:27:09 **23** documentation; namely, the transcripts. Correct?
 09:27:12 **24** **A.** Well you used the word -- I just picked up
 09:27:15 **25** on the word "determined." I've evaluated the
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

20

09:27:19 **1** credibility based on statements to the police and in
 09:27:23 **2** deposition transcripts. I can't determine the
 09:27:27 **3** credibility because there's no way to do that after
 09:27:31 **4** the fact.
 09:27:32 **5** **Q.** In evaluating the credibility of a witness
 09:27:36 **6** in this case, did you make any subsequent judgment as
 09:27:40 **7** to whether or not any particular piece of testimony or
 09:27:43 **8** evidence offered by a witness was or was not credible?
 09:27:48 **9** **A.** I would have to take case by case.
 09:27:50 **10** **Q.** The answer is either "yes" or "no." Either
 09:27:51 **11** you made judgements as to the credibility of witness
 09:27:54 **12** testimony, or you did not.
 09:27:57 **13** **A.** I have weighed evidence more strongly than
 09:28:03 **14** others.
 09:28:05 **15** **Q.** You have weighed evidence more strongly than
 09:28:07 **16** others. Whose evidence? Which pieces of evidence?
 09:28:14 **17** **A.** Yeah, we'd have to go case by case.
 09:28:16 **18** **Q.** Is it fair to say that you weighed a
 09:28:20 **19** considerable amount of evidence and determined whether
 09:28:22 **20** some evidence was more -- weighted more strongly than
 09:28:27 **21** other pieces of evidence?
 09:28:28 **22** **A.** Yeah. I can't address that question in some
 09:28:32 **23** blanket, general, vague way. We'd have to -- We'd
 09:28:36 **24** have to go step-by-step through -- you know, you
 09:28:41 **25** clearly have, you know, some issues that you might
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

<p style="text-align: right;">21</p> <p>09:28:44 1 want to discuss, and we can discuss each of those</p> <p>09:28:47 2 point by point if you like.</p> <p>09:28:49 3 Q. What I'm --</p> <p>09:28:50 4 A. But a blanket statement I cannot make.</p> <p>09:28:52 5 Q. You've testified that you have reviewed</p> <p>09:28:54 6 witness testimony vis-à-vis the transcripts, and you</p> <p>09:28:59 7 have weighed evidence and considered some evidence</p> <p>09:29:03 8 more strongly than other evidence. True?</p> <p>09:29:07 9 A. Yes.</p> <p>09:29:08 10 Q. In other words, you have given more</p> <p>09:29:11 11 credibility to some pieces of evidence than other</p> <p>09:29:13 12 pieces of evidence; true?</p> <p>09:29:19 13 A. I would not agree with the -- with the term</p> <p>09:29:22 14 "credibility." I would say that -- that I've -- I've</p> <p>09:29:29 15 assigned weight to some pieces of information that</p> <p>09:29:35 16 have come before me more than other pieces of</p> <p>09:29:38 17 information. That doesn't mean that -- necessarily</p> <p>09:29:46 18 that one piece of information is more credible. It</p> <p>09:29:51 19 could be that someone has a false memory of what has</p> <p>09:29:58 20 occurred, so for them it's quite credible, even though</p> <p>09:30:01 21 it's a false memory.</p> <p>09:30:04 22 Q. Who in this case do you believe has a false</p> <p>09:30:06 23 memory?</p> <p>09:30:07 24 A. We'd have to go case by case.</p> <p>09:30:09 25 Q. Do you believe any person in this case has a</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>	<p style="text-align: right;">23</p> <p>09:31:05 1 A. I don't know how many.</p> <p>09:31:06 2 Q. And as well as all the depositions in this</p> <p>09:31:09 3 giant notebook here; right?</p> <p>09:31:11 4 A. I don't know what's in your notebook.</p> <p>09:31:13 5 Q. Well it's all the deposition exhibits.</p> <p>09:31:15 6 A. I have reviewed the depositions that are</p> <p>09:31:18 7 listed in my report.</p> <p>09:31:19 8 Q. Did you review the deposition exhibits?</p> <p>09:31:21 9 A. Yes.</p> <p>09:31:21 10 Q. Okay. And you had an opportunity, as you've</p> <p>09:31:26 11 testified, to get ready for this deposition today.</p> <p>09:31:28 12 A. Yes.</p> <p>09:31:28 13 Q. "Yes"?</p> <p>09:31:29 14 So my question to you, sir, is again, tell</p> <p>09:31:34 15 me which individual in this -- the case, of all the</p> <p>09:31:39 16 people who were involved and have been deposed, you</p> <p>09:31:43 17 believe has a false memory.</p> <p>09:31:45 18 A. Again we'll have to go case by case. If you</p> <p>09:31:48 19 have an issue with some of my opinions and want to</p> <p>09:31:53 20 examine the support for my opinions and some of that</p> <p>09:31:58 21 support has to do with the statements made or</p> <p>09:32:03 22 statements omitted in supporting my opinions, then I'm</p> <p>09:32:07 23 happy to do that. But a blanket statement I think</p> <p>09:32:09 24 is -- I don't -- I'm not willing to entertain.</p> <p>09:32:15 25 Q. So when you say you do believe some people</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>
<p style="text-align: right;">22</p> <p>09:30:11 1 false memory? Is that your claim?</p> <p>09:30:15 2 A. I think that is a possibility, yes.</p> <p>09:30:17 3 Q. Who?</p> <p>09:30:18 4 A. We would have to go case by case.</p> <p>09:30:20 5 Q. You've had an opportunity to prepare for</p> <p>09:30:22 6 this deposition; true?</p> <p>09:30:24 7 A. Yes.</p> <p>09:30:25 8 Q. You've had an opportunity to review every</p> <p>09:30:28 9 piece of information that's been generated in this</p> <p>09:30:30 10 case; hasn't it?</p> <p>09:30:32 11 A. Yes.</p> <p>09:30:32 12 Q. Has any piece of information that you've</p> <p>09:30:34 13 asked from your lawyer been denied to you?</p> <p>09:30:39 14 A. Not that I'm aware.</p> <p>09:30:40 15 Q. Have you asked your attorney -- asked Mr.</p> <p>09:30:42 16 Moore, who's hired you, for any piece of information</p> <p>09:30:46 17 and not received it?</p> <p>09:30:47 18 A. I have not.</p> <p>09:30:48 19 Q. Okay. So you've had an opportunity to</p> <p>09:30:50 20 review numerous depositions; yes?</p> <p>09:30:54 21 A. Yes.</p> <p>09:30:54 22 Q. And go to the site; yes?</p> <p>09:30:56 23 A. Yes.</p> <p>09:30:57 24 Q. And review upwards of 36, I believe,</p> <p>09:31:01 25 separate items of documentation; yes?</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>	<p style="text-align: right;">24</p> <p>09:32:18 1 in this case have evidenced false memory, you're</p> <p>09:32:23 2 unwilling to tell us who those individuals are.</p> <p>09:32:25 3 A. Well it's -- we'd need to walk through and</p> <p>09:32:29 4 see what comes out.</p> <p>09:32:32 5 Q. And you have given certain pieces of</p> <p>09:32:36 6 evidence more weight than other pieces of evidence;</p> <p>09:32:38 7 correct?</p> <p>09:32:41 8 A. Yes. I would say that, yes.</p> <p>09:32:43 9 Q. Have you determined that some of the</p> <p>09:32:45 10 witnesses are more credible in their testimony than</p> <p>09:32:48 11 other witnesses?</p> <p>09:32:52 12 A. No.</p> <p>09:32:53 13 Q. Not at all?</p> <p>09:32:54 14 A. No.</p> <p>09:32:56 15 Q. Even the ones who have false memories?</p> <p>09:32:58 16 A. Yes.</p> <p>09:33:09 17 Q. When were you hired on this case?</p> <p>09:33:14 18 A. (Witness reviewing documents.) May 13 of</p> <p>09:33:32 19 this year.</p> <p>09:33:35 20 Q. After Joellen Gill issued her report;</p> <p>09:33:42 21 correct?</p> <p>09:33:42 22 A. I don't remember the date of her report.</p> <p>09:33:44 23 Q. The date of her report was April 25th of</p> <p>09:33:48 24 2018.</p> <p>09:33:48 25 A. Yes, I do remember having a conversation at</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>

09:44:14 **1** A. Okay.

09:44:14 **2** Q. And you list a number of specialties.

09:44:16 **3** A. Yes.

09:44:17 **4** Q. Okay. Human factors/ergonomics; human

09:44:21 **5** performance/information processing; lighting,

09:44:25 **6** visibility, conspicuity; driver and pedestrian

09:44:29 **7** perception and behavior; perception-response time;

09:44:32 **8** visual-motor coordination; slip, trip, misstep, falls;

09:44:37 **9** product design, liability (including medical,

09:44:40 **10** consumer, construction products); warnings, signs,

09:44:44 **11** interactions; human-machine interaction;

09:44:47 **12** control/display layout; and safety.

09:44:51 **13** You claim expertise in all of those areas;

09:44:53 **14** is that correct?

09:44:54 **15** A. Yes.

09:45:05 **16** Q. In the past you've worked, according to your

09:45:24 **17** CV, on cases involving falls, warnings, workplace

09:45:31 **18** incidents, products liability, vehicle incidents and

09:45:34 **19** human-machine interaction.

09:45:35 **20** Are there any broad categories of cases that

09:45:38 **21** you've worked on that you feel relevant to tell us

09:45:41 **22** about today that would be germane to -- to this case?

09:45:48 **23** A. I have had cases that's similar; children

09:45:58 **24** falling down utility holes, you know, that still falls

09:46:07 **25** under -- falls under the category of trip, slip and

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

09:46:16 **1** falls, but those are the broad categories of cases.

09:46:18 **2** Q. Just so the jury is clear, you're not

09:46:20 **3** claiming that Maggie tripped and fell in this case;

09:46:24 **4** are you?

09:46:25 **5** A. I don't think anybody knows.

09:46:27 **6** Q. I'm asking you are you making that claim,

09:46:29 **7** that she tripped and fell into the water?

09:46:31 **8** A. I think it's a possibility, yes.

09:46:33 **9** Q. Okay. Based on what?

09:46:35 **10** A. The -- The uneven surface of the top of the

09:46:40 **11** canyon wall, the direction of forward movement

09:46:46 **12** described by Jeremy as he watched Maggie fall into the

09:46:51 **13** river are consistent with a trip and fall.

09:46:56 **14** Q. Okay. Are --

09:47:02 **15** Will you be testifying, or is it your

09:47:04 **16** intention to testify, to a reasonable degree of

09:47:08 **17** scientific certainty, that it is more likely than not

09:47:11 **18** that Maggie Zaiger tripped and fell into the water on

09:47:14 **19** March 18th, 2018?

09:47:21 **20** A. I think the two most likely scenarios are

09:47:24 **21** that she tripped and fell, or she took what's called

09:47:28 **22** an air step. She stepped into the foam, perhaps

09:47:35 **23** believing that there was a rock surface underneath and

09:47:39 **24** not -- not having any solid, stable surface to step on

09:47:43 **25** and then she fell. So those are the two most likely

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

09:47:49 **1** possibilities, but it's not possible to determine

09:47:51 **2** which of those two occurred.

09:47:53 **3** MR. SIEFF: I will move to strike that

09:47:54 **4** answer as nonresponsive.

09:47:56 **5** I will repose the question. And Debby, if

09:47:59 **6** you would be so kind as to read it to Dr. Nemire.

09:48:02 **7** (Record read by the reporter from

09:48:27 **8** Page 34, Lines 15 to 19.)

09:48:27 **9** A. Again, no. It's not possible to determine

09:48:32 **10** if it's more likely or not that she tripped, and it's

09:48:34 **11** not lik -- it's not possible to determine that it's

09:48:38 **12** most likely or not that she took an air step.

09:48:41 **13** Q. You had an opportunity to review your report

09:48:44 **14** that you authored before coming in here today?

09:48:46 **15** A. Yes.

09:48:47 **16** Q. And in fact you did review it?

09:48:49 **17** A. Yes.

09:48:50 **18** Q. And in your report you state that all of

09:48:52 **19** your opinions or conclusions are final to a reasonable

09:48:56 **20** degree of scientific certainty.

09:48:59 **21** A. Yes.

09:49:00 **22** Q. Those are your words.

09:49:01 **23** A. Later on it says I have the -- reserve the

09:49:03 **24** right to amend my opinions, you know, should other

09:49:08 **25** information come forward.

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

09:49:11 **1** Q. All right. I'll ask you this broad

09:49:14 **2** question: Are --

09:49:14 **3** Have any of the opinions that you've

09:49:16 **4** expressed in your report been amended, or do you

09:49:20 **5** intend on amending them today?

09:49:31 **6** A. Yeah, I don't recall right now whether I

09:49:33 **7** mentioned the possibility of a trip or -- Oh, I did

09:49:37 **8** mention that the rocks posed a trip hazard, but I

09:49:41 **9** don't believe my report specifies one way or the other

09:49:45 **10** whether it was a air step or a trip and fall.

09:49:49 **11** Q. Isn't it true that your report does not

09:49:52 **12** state that you believe, to a reasonable degree of

09:49:55 **13** scientific certainty, that it is more likely than not

09:49:59 **14** that Maggie Zaiger tripped and fell into the river?

09:50:05 **15** A. I'm sorry. What's the question again?

09:50:06 **16** Q. Isn't that true?

09:50:07 **17** Isn't it true that nowhere in your report do

09:50:10 **18** you state that it is your opinion that Maggie Zaiger

09:50:13 **19** tripped and fell into the water?

09:50:17 **20** A. (Witness reviewing documents.) Yeah, I did

09:50:30 **21** not address the mechanism of fall in the report

09:50:34 **22** because the report was addressing Ms. Gill's opinions.

09:50:39 **23** Q. So you were retained simply to testify that

09:50:45 **24** the expert who has been retained by Maggie's mother

09:50:50 **25** was wrong; is that right?

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

09:56:14 **1** right?

09:56:16 **2** **A.** Yes.

09:56:17 **3** **Q.** So out of these 22 or so that you have done

09:56:21 **4** in the last five years, how many times were you --

09:56:27 **5** were your opinions right? Do you know?

09:56:35 **6** **A.** It's -- It --

09:56:37 **7** We typically can't know whether an opinion

09:56:39 **8** is right or not, just have to go with the research and

09:56:46 **9** evaluate the evidence and indicate, you know, whether

09:56:53 **10** something most likely or not occurred.

09:56:56 **11** **Q.** Sure.

09:56:57 **12** In other words, there's no way to quantify,

09:57:02 **13** in real terms, whether your opinion is right or wrong.

09:57:06 **14** **A.** Well I always base my opinions on scientific

09:57:08 **15** research. Scientific research is typically, you know,

09:57:15 **16** accurate, as I said, within five percent. Some

09:57:20 **17** research, such as warnings, indicates that people, you

09:57:25 **18** know, pay attention to warnings, say, 60 percent of

09:57:27 **19** the time or 90 percent of the time, which would

09:57:31 **20** indicate maybe there's 10 percent of the time people

09:57:33 **21** are not paying attention to warnings. So if I believe

09:57:36 **22** that a warning is sufficient and adequate to encourage

09:57:44 **23** someone to notice, read, understand and follow that

09:57:47 **24** warning, it's -- 90 percent of the people might follow

09:57:53 **25** that warning, but -- but there is always that 10

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

09:59:18 **1** **Q.** Okay. You both have experience and

09:59:22 **2** background in the sciences, you can't both be correct

09:59:28 **3** at the same time. So my question to you, sir, is

09:59:32 **4** this:

09:59:33 **5** Is there a known and scientifically accepted

09:59:38 **6** method for quantifying or determining the error rate

09:59:41 **7** of a litigation forensic human factors expert's

09:59:47 **8** opinions in the litigation context?

09:59:50 **9** **A.** I think the issue here in comparing Ms.

09:59:54 **10** Gill's opinions with mine is that I use scientific

09:59:58 **11** research to support my opinions and she does not.

10:00:04 **12** **Q.** That we'll talk about.

10:00:06 **13** Is there a way to quantify an error rate as

10:00:09 **14** to the opinions you've expressed in prior cases or

10:00:12 **15** not?

10:00:14 **16** **A.** Well opinions in a prior case, there -- as

10:00:20 **17** in this case, there are many different opinions. So,

10:00:23 **18** you know, if I have ten opinions in this case, one of

10:00:28 **19** them may not be accurate based on actual events. That

10:00:39 **20** would still indicate that overall, you know, my

10:00:40 **21** opinions in this case were accurate and has a low

10:00:45 **22** error rate.

10:00:47 **23** You'd have to do a similar analyses across

10:00:50 **24** all the cases and all of Ms. Gill's cases, but there's

10:00:56 **25** no way of knowing what actually happened unless there

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

09:57:56 **1** percent that may not notice it for whatever reason, or

09:58:00 **2** decide not to follow it.

09:58:03 **3** **Q.** Do -- Do you know if there has --

09:58:08 **4** Have you ever done an analysis looking

09:58:11 **5** backwards as to whether or not the opinions you have

09:58:14 **6** rendered in prior cases have been proven to be

09:58:18 **7** accurate and correct, or wrong?

09:58:23 **8** **A.** Yeah, there's no way of knowing that.

09:58:26 **9** **Q.** There's no way to quantify an error rate for

09:58:29 **10** your opinions; true?

09:58:31 **11** **A.** Well as I said, I base my opinions on

09:58:33 **12** scientific research and so it's more likely than not

09:58:37 **13** that my opinions are correct, but there's always the

09:58:43 **14** possibility that one of those opinions is not correct

09:58:47 **15** just because of the nature of statistics and human

09:58:52 **16** behavior.

09:58:53 **17** **Q.** Well, sir, you have opinions in this case

09:58:58 **18** that you claim are more likely than not correct; true?

09:59:02 **19** **A.** Yes.

09:59:03 **20** **Q.** Dr. Gill has opinions in this case --

09:59:05 **21** **A.** Ms. Gill.

09:59:06 **22** **Q.** Ms. Gill. Apologize.

09:59:09 **23** -- in this case which she believes are more

09:59:12 **24** likely than not correct; true?

09:59:16 **25** **A.** That's what she says, yes.

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

10:01:00 **1** is video evidence.

10:01:04 **2** **Q.** In this particular case, sir, you have

10:01:08 **3** rendered opinions that have -- may have important

10:01:10 **4** consequences; true?

10:01:12 **5** **A.** Yes.

10:01:12 **6** **Q.** They may have financial consequences.

10:01:16 **7** **A.** Yes.

10:01:16 **8** **Q.** They may have deep and serious emotional and

10:01:20 **9** lasting psychological consequences for people; true?

10:01:24 **10** **A.** Yes.

10:01:25 **11** **Q.** And it's your testimony that some of your

10:01:27 **12** opinions may not be right and others may. Is that

10:01:32 **13** true?

10:01:33 **14** **A.** That's always the possibility, --

10:01:35 **15** **Q.** Right.

10:01:35 **16** **A.** -- just as with Ms. Gill's opinions.

10:01:38 **17** **Q.** And you understand that this is a very

10:01:40 **18** serious matter we're dealing with here.

10:01:42 **19** **A.** Yes.

10:01:44 **20** **Q.** And everything you have done up till now,

10:01:47 **21** according to your testimony, is based on applying the

10:01:53 **22** concepts of forensic human factors techniques and the

10:02:00 **23** application of scientific methods and techniques to an

10:02:04 **24** investigation; is that right?

10:02:06 **25** **A.** And relying on research that has used the

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

12:38:12 **1** appear to be a causal factor," is rele -- is as
 12:38:17 **2** related to the description provided by the newspaper.
 12:38:20 **3** **Q.** Well what you wrote exactly was: "The
 12:38:23 **4** presence of foam did not appear to be a causal factor
 12:38:26 **5** in most of the drowning and rescue incidents."
 12:38:30 **6** **A.** As described by the newspaper.
 12:38:32 **7** **Q.** Okay. When you say "in most of the drowning
 12:38:34 **8** and rescue incidents," what you're really saying is in
 12:38:38 **9** none of the drowning and rescue incidents; is that
 12:38:41 **10** correct?
 12:38:41 **11** **A.** Well as I said, as described by the
 12:38:43 **12** newspaper. The newspaper only talks about foam as
 12:38:46 **13** somehow being related to a fall.
 12:38:46 **14** **Q.** But --
 12:38:50 **15** **A.** So in the newspaper accounts there is one
 12:38:52 **16** out of the 42. So saying that -- and foam might be
 12:38:59 **17** considered a causal factor in that 2013 incident as
 12:39:02 **18** described in the newspaper. So there's still one out
 12:39:06 **19** of the 42 that seems to be somehow related to foam.
 12:39:11 **20** So then the presence of foam did not appear to be a
 12:39:13 **21** causal factor in most of the drowning and rescue
 12:39:16 **22** incidents is correct, because 41 out of the 42 did not
 12:39:20 **23** appear to be related to foam. Forty-one out of 42
 12:39:24 **24** would clearly be most --
 12:39:25 **25** **Q.** Okay.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

12:39:26 **1** **A.** -- and not all.
 12:39:27 **2** **Q.** In par --
 12:39:28 **3** In the first paragraph of Section 7 you
 12:39:30 **4** conducted an analyses of the reports of previous
 12:39:37 **5** accidents and near-miss accidents, in this case
 12:39:39 **6** drownings or near drownings; right?
 12:39:43 **7** **A.** Yes.
 12:39:44 **8** **Q.** And you utilized a newspaper report from the
 12:39:50 **9** Sioux Falls Argus; correct?
 12:39:52 **10** **A.** I think it's called the Argus Leader, but
 12:39:54 **11** yes.
 12:39:55 **12** **Q.** Okay. And you considered utilizing the
 12:39:58 **13** Argus Leader to conduct a hazard analysis to be
 12:40:04 **14** scientifically valid, is that correct, for a hazard
 12:40:08 **15** analysis?
 12:40:11 **16** **A.** Yes. It's the same way that other --
 12:40:14 **17** **Q.** Okay.
 12:40:15 **18** **A.** -- hazard analyses are performed in
 12:40:18 **19** companies, say, or industry, where you would look at
 12:40:21 **20** reports of incidents that had occurred in a certain
 12:40:24 **21** timeframe. And so those reports provide the data for
 12:40:28 **22** the hazard analyses.
 12:40:30 **23** **Q.** And based on your scientific analyses of the
 12:40:33 **24** reports of drownings and near drownings as derived
 12:40:36 **25** from the Argus Leader, you concluded the presence of

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

12:40:39 **1** foam did not appear to be a causal factor in most of
 12:40:43 **2** the drowning and rescue incidents.
 12:40:45 **3** **A.** Yes. And as I said, this is -- this is not
 12:40:47 **4** intended to be a thorough analysis, but this is the
 12:40:53 **5** data that is available to me at the time and is more
 12:40:58 **6** thorough and complete than any analyses that Ms. Gill
 12:41:02 **7** appeared to have conducted.
 12:41:03 **8** **Q.** Is it intended to be something you relied
 12:41:05 **9** upon in reaching your opinions in this case?
 12:41:08 **10** **A.** I'm sorry, which is?
 12:41:09 **11** **Q.** Is this analyses you conducted, which you
 12:41:12 **12** acknowledge is not thorough, something that you relied
 12:41:15 **13** upon in reaching your opinions in this case?
 12:41:18 **14** **A.** Yes.
 12:41:19 **15** **Q.** Is it something that you would expect the
 12:41:21 **16** jury to rely upon in reaching their decision about
 12:41:24 **17** this case?
 12:41:27 **18** **A.** I think I have said before, I'm -- I'm -- I
 12:41:35 **19** am presenting information from a human factors
 12:41:38 **20** perspective to the jury. What they do with that is --
 12:41:44 **21** is up to them, so I have no expectation one or the
 12:41:47 **22** other. I present the information as best I can.
 12:41:50 **23** **Q.** And based upon your less -- this
 12:41:52 **24** less-than-thorough analyses you conducted, you did
 12:41:55 **25** conclude that the presence of foam appeared to be a

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

12:41:58 **1** causal factor in at least one drowning and rescue
 12:42:01 **2** incident; true?
 12:42:02 **3** **A.** According to the newspaper reports.
 12:42:04 **4** **Q.** According to the newspaper reports from
 12:42:07 **5** which you conducted your analysis; correct?
 12:42:09 **6** **A.** Yes.
 12:42:10 **7** **Q.** All right. And the one drowning incident in
 12:42:18 **8** which the presence of foam appeared to be a causal
 12:42:22 **9** factor was the incident that occurred in 2013;
 12:42:25 **10** correct?
 12:42:26 **11** **A.** Yes.
 12:42:28 **12** **Q.** Which we've already discussed as having
 12:42:31 **13** occurred in approximately the same area as where
 12:42:35 **14** Maggie Zaiger went into the water; correct?
 12:42:38 **15** **A.** That's my understanding.
 12:42:39 **16** **Q.** Okay. As a general proposition, how many
 12:43:01 **17** times does a hazard have to manifest itself in the
 12:43:05 **18** injury or death to a human being before it warrants
 12:43:08 **19** being acted upon?
 12:43:15 **20** **A.** And hazard analyses you don't necessarily
 12:43:20 **21** look at number of incidents, you look at of all the
 12:43:27 **22** incidents, you know -- Well first you do an analyses
 12:43:31 **23** of each incident, what appears to be the primary
 12:43:34 **24** factors at work responsible for causing this injury
 12:43:40 **25** incident. And then, once you have -- once you've

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

12:48:28 **1** Q. You are aware that our claim is related to
 12:48:31 **2** the buildup of foam in Falls Park; yes?
 12:48:34 **3** A. Yes.
 12:48:35 **4** Q. Okay. So I just want to make sure I
 12:48:37 **5** understand something. You have conducted an analysis
 12:48:42 **6** of 42 incidents based upon what the Argus Leader has
 12:48:45 **7** reported, but you have not conducted any further
 12:48:48 **8** analysis into drownings or near drownings occurring at
 12:48:53 **9** Falls Park in February or March where foam is alleged
 12:48:58 **10** to have been present or a contributing factor; is that
 12:49:01 **11** right?
 12:49:03 **12** A. That's right.
 12:49:04 **13** Q. Okay.
 12:49:04 **14** A. I'm not aware of any information to that
 12:49:07 **15** effect beyond what I described in my report.
 12:49:09 **16** Q. Did you ask for that information?
 12:49:10 **17** A. I have not.
 12:49:11 **18** Q. All right. And you do agree that the
 12:49:14 **19** presence of foam appeared to be a causal factor in the
 12:49:17 **20** 2013 drownings.
 12:49:21 **21** A. Well --
 12:49:23 **22** Q. Isn't that what your report indicates?
 12:49:26 **23** A. Again, this statement has to do with factors
 12:49:33 **24** identified by the newspaper as somehow related to this
 12:49:36 **25** incident --

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

12:49:37 **1** Q. Well --
 12:49:37 **2** A. -- as -- and that is what I am reporting
 12:49:41 **3** here. So this is a description of hazards according
 12:49:47 **4** to analyses of 42 injury and fatal incidents. That's
 12:49:54 **5** -- This is the only database that I know about, so I
 12:49:57 **6** finish with describing, you know, foam is only
 12:50:00 **7** mentioned in one. I don't know that -- I don't recall
 12:50:04 **8** that the event description said foam is a causal
 12:50:08 **9** factor, it was just something that seems to be
 12:50:11 **10** related.
 12:50:12 **11** Q. You had the benefit of all of the law
 12:50:16 **12** enforcement reports related to the 2013 incidents --
 12:50:19 **13** A. Yes.
 12:50:19 **14** Q. -- incident; correct?
 12:50:21 **15** And it's true that foam is repeatedly
 12:50:24 **16** mentioned as a factor in not only the drowning, but
 12:50:28 **17** the rescue efforts. Isn't that true?
 12:50:33 **18** A. No. My recollection is --
 12:50:34 **19** Q. All right.
 12:50:35 **20** A. -- they mention foam as impeding rescue
 12:50:38 **21** efforts. But I don't recall, you know, statements to
 12:50:43 **22** the effect that foam caused Garrett to fall.
 12:50:47 **23** Q. Did you make any attempt to analyze whether
 12:50:50 **24** or not the presence of foam was a causal factor in the
 12:50:54 **25** 2013 drownings, independent of anything that the Argus

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

12:50:59 **1** Leader has reported?
 12:51:00 **2** A. I did not.
 12:51:01 **3** Q. Do you hold an opinion as to whether or not
 12:51:04 **4** the presence of foam was or was not a causal factor in
 12:51:08 **5** the 2013 drowning incident?
 12:51:11 **6** A. Yeah. Again, I have not done that analyses
 12:51:13 **7** for the 2013 incident.
 12:51:15 **8** Q. So the answer is no.
 12:51:16 **9** A. Yes.
 12:51:17 **10** Q. If the presence of foam was found to be a
 12:51:28 **11** causal factor in the 2013 drowning incident, do you
 12:51:33 **12** hold the opinion or would you hold the opinion that
 12:51:37 **13** efforts should have been undertaken to address that
 12:51:40 **14** hazard?
 12:51:41 **15** MR. MOORE: Object to form and foundation.
 12:51:43 **16** A. My understanding of city staff and -- and
 12:51:48 **17** risk management efforts they undertook is they might
 12:51:52 **18** have looked at foam, but did not consider it a hazard,
 12:51:55 **19** and therefore they did not take any -- or make any
 12:52:00 **20** efforts to address hazard of the foam in terms of
 12:52:03 **21** trying to mitigate that hazard.
 12:52:05 **22** Q. Right. I want to --
 12:52:06 **23** A. So based on their analyses, then I would
 12:52:08 **24** have to say that they did not consider foam to be a
 12:52:11 **25** hazard after the 2013 incident and before the 2018

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

12:52:16 **1** incident.
 12:52:17 **2** MR. SIEFF: Move to strike.
 12:52:20 **3** Q. You are a human factors engineer, and also
 12:52:26 **4** are certified in safety matters; yes?
 12:52:29 **5** A. I'm a certified ergonomics professional.
 12:52:33 **6** Q. Okay. And you are -- consult or in the past
 12:52:36 **7** you've been asked to perform hazard analyses; correct?
 12:52:38 **8** A. I have done that, yes.
 12:52:40 **9** Q. And you've been asked to provide
 12:52:44 **10** recommendations on how to address any particular
 12:52:47 **11** hazard; correct?
 12:52:48 **12** A. I have done that, yes.
 12:52:49 **13** Q. Including things like roller coasters;
 12:52:51 **14** correct?
 12:52:52 **15** A. Yes.
 12:52:53 **16** Q. Okay. So here's what I would like to know:
 12:52:58 **17** If the City of Sioux Falls came to you in 2014 and
 12:53:03 **18** said, Dr. Nemire, we had this drowning occur -- two
 12:53:08 **19** drownings occur at our park in 2013 and we believe
 12:53:12 **20** that the foam buildup was a causal factor in this,
 12:53:18 **21** what steps would you recommend, as a human factors
 12:53:24 **22** specialist or expert, to address that hazard?
 12:53:29 **23** A. Well first I would ask what analyses they
 12:53:33 **24** conducted to come to the conclusion that foam was a
 12:53:36 **25** hazard.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

12:59:38 **1** The information I have seen right now does
 12:59:41 **2** not indicate to me that foam is a hazard, so I don't
 12:59:43 **3** -- I can't imagine that if I had done more extensive
 12:59:49 **4** hazard analyses that you're trying to get me to -- to
 12:59:53 **5** describe, I don't know that I would have identified
 12:59:57 **6** foam as a hazard in the 2013 instance either.
 13:00:03 **7** **Q.** As a statistical matter, does the fact that
 13:00:10 **8** out of 42 incidents only one incident appears to be
 13:00:15 **9** related to a particular causal factor mean that that
 13:00:19 **10** one incident does not need to be addressed going
 13:00:21 **11** forward?
 13:00:23 **12** **A.** No.
 13:00:23 **13** **Q.** All right. Thank you.
 13:00:26 **14** Now you referred to the area --
 13:00:28 **15** **A.** You didn't let me finish my response.
 13:00:30 **16** **Q.** You said "no."
 13:00:31 **17** **A.** And I was taking a breath so I could --
 13:00:36 **18** MR. MOORE: That's all right.
 13:00:37 **19** THE WITNESS: All right.
 13:00:40 **20** **Q.** When you went to the falls on July 11, 2019,
 13:00:51 **21** was that your first visit to Falls Park?
 13:00:55 **22** **A.** Yes.
 13:00:55 **23** **Q.** Was that your first visit to South Dakota?
 13:01:08 **24** **A.** Maybe. I might have driven through.
 13:01:10 **25** **Q.** Okay. And what was the weather like on the
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

138

13:01:18 **1** day you were there?
 13:01:20 **2** **A.** What time of day?
 13:01:22 **3** **Q.** Let's start at --
 13:01:24 **4** Well that's a good question.
 13:01:25 **5** How long were you there?
 13:01:29 **6** **A.** About 12 hours. Well, no, 10 altogether
 13:01:32 **7** maybe. So in the morning it started out clear, I
 13:01:47 **8** don't know, maybe '60s, '70s weather, was not wearing
 13:01:51 **9** a jacket, and then about 5 or 5:30 a big storm rolled
 13:01:55 **10** in for a couple of hours.
 13:01:57 **11** **Q.** Rainstorm.
 13:01:57 **12** **A.** Hail --
 13:01:58 **13** **Q.** No snow.
 13:01:59 **14** **A.** -- and rain.
 13:02:00 **15** **Q.** No snow.
 13:02:01 **16** **A.** No snow.
 13:02:02 **17** **Q.** There was no snow on July 11th, '19; was
 13:02:05 **18** there?
 13:02:06 **19** **A.** Not that I noticed.
 13:02:07 **20** **Q.** Okay. How many people did you count at the
 13:02:17 **21** park being there while you were there?
 13:02:22 **22** **A.** Well I only counted families with small
 13:02:27 **23** children that were around the river.
 13:02:29 **24** **Q.** Were there more than those families with
 13:02:32 **25** small children present in the park?
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

13:02:38 **1** **A.** (Witness reviewing documents.) Well yes,
 13:02:41 **2** there are more than just those people, adults with
 13:02:46 **3** children at the park, there are other people that I
 13:02:49 **4** did not make any effort to count them.
 13:02:51 **5** **Q.** I'm trying to understand if there were
 13:02:55 **6** hundreds of people there, 20 people, 500; how busy was
 13:03:00 **7** the park?
 13:03:01 **8** **A.** It's hard to say. There was a fair number
 13:03:04 **9** of people around. The cafe was pretty full.
 13:03:08 **10** **Q.** Now you went to the park with who?
 13:03:10 **11** **A.** I was there with a research assistant, I met
 13:03:15 **12** Ms. Carpenter, I met Mr. Mieras, met Detective Bakke.
 13:03:25 **13** I believe that's it.
 13:03:26 **14** **Q.** Who's the research assistant?
 13:03:30 **15** **A.** His name is Daniel Nemire, he's my son.
 13:03:33 **16** **Q.** Okay. Page 5 of your report you state: I
 13:04:03 **17** conducted a site inspection on June 11, 2019. During
 13:04:07 **18** the site inspection I was accompanied by -- part of
 13:04:10 **19** the time by Melanie Carpenter, Kirby Mieras, and Tim
 13:04:17 **20** Bakke. Why did you not identify your son?
 13:04:21 **21** **A.** It was an oversight.
 13:04:22 **22** **Q.** Was he there in an official capacity?
 13:04:24 **23** **A.** Yes.
 13:04:25 **24** **Q.** And you read your report before you
 13:04:26 **25** submitted it to Mr. Moore?
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

140

13:04:28 **1** **A.** Yes.
 13:04:30 **2** **Q.** And this was an oversight?
 13:04:33 **3** **A.** Apparently so.
 13:04:34 **4** **Q.** Any other oversights in your report we
 13:04:38 **5** should know about?
 13:04:39 **6** **A.** Not that I'm aware of.
 13:04:41 **7** **Q.** Did your son take notes from -- during the
 13:04:43 **8** visit?
 13:04:44 **9** **A.** Yes.
 13:04:45 **10** **Q.** Where are those notes?
 13:04:47 **11** **A.** Some of them I transcribed on the computer,
 13:04:50 **12** and some of them I have here.
 13:04:56 **13** **Q.** Was he writing them or typing them into a
 13:04:58 **14** machine of some sort, like a computer?
 13:05:01 **15** **A.** He was hand writing --
 13:05:02 **16** **Q.** Okay.
 13:05:03 **17** **A.** -- on a yellow legal pad.
 13:05:05 **18** **Q.** Were -- Were you taking notes?
 13:05:07 **19** **A.** Yes, I also took notes.
 13:05:09 **20** **Q.** Can I see these notes?
 13:05:11 **21** **A.** The notes I took --
 13:05:13 **22** **Q.** All the notes from that inspection, please.
 13:05:15 **23** **A.** Right. They are -- Some of the notes I took
 13:05:18 **24** are transcribed in the interview document that
 13:05:21 **25** apparently was sent to you, and then other notes are
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

13:05:25 **1** described -- transcribed into a document called
 13:05:31 **2** "Notes."
 13:05:33 **3** **Q.** Where are the handwritten notes that existed
 13:05:36 **4** before they were transcribed?
 13:05:38 **5** **A.** I don't keep those.
 13:05:39 **6** **Q.** They were thrown away?
 13:05:41 **7** **A.** Yes.
 13:05:42 **8** **Q.** Okay. Do you have the transcription?
 13:05:44 **9** **A.** Yes.
 13:05:44 **10** **Q.** Can I see it, please?
 13:05:51 **11** **A.** [Handing.] The top of the page it says Site
 13:05:55 **12** Visit Notes or something like that.
 13:06:21 **13** **Q.** In your site visit notes under 3F you put
 13:06:25 **14** "NB," which I believe is a note, question. Photos
 13:06:29 **15** show little snow on ground; why would someone think
 13:06:33 **16** there was thick snow built up on one location on
 13:06:36 **17** river, question mark.
 13:06:39 **18** Read that correctly?
 13:06:43 **19** **A.** (Witness reviewing document.) Which one is
 13:06:46 **20** this?
 13:06:46 **21** **Q.** I think it's number 3. I don't have a copy
 13:06:51 **22** of it so I can't look at it.
 13:06:53 **23** **A.** Yeah. Photos show little snow on ground.
 13:06:55 **24** **Q.** And you only observed little snow on ground
 13:06:58 **25** when you were there; right?

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

13:08:31 **1** **Q.** White and fluffy?
 13:08:33 **2** **A.** Sure.
 13:08:34 **3** **Q.** So that's your description of the -- of it;
 13:08:36 **4** right? You're not -- You don't --
 13:08:37 **5** You don't have a basis from anybody's
 13:08:40 **6** testimony that the snow appeared to be white and
 13:08:42 **7** fluffy; do you?
 13:08:45 **8** **A.** Testimony is -- is absent descriptions. All
 13:08:52 **9** they say is that the big pile of stuff that looked
 13:08:54 **10** like snow. So big piles of snow might be considered
 13:09:01 **11** -- might be described as fluffy.
 13:09:03 **12** **Q.** By who?
 13:09:04 **13** **A.** Anybody looking at a big pile of snow.
 13:09:07 **14** **Q.** Anybody --
 13:09:08 **15** **A.** But no, none of these members of these two
 13:09:10 **16** -- of this party provided any descriptive
 13:09:14 **17** characteristics of this pile of stuff.
 13:09:19 **18** **Q.** Did anyone of this party provide any
 13:09:22 **19** testimony as to the basis for their belief that it was
 13:09:26 **20** snow, a pile of snow?
 13:09:28 **21** **A.** No.
 13:09:29 **22** **Q.** Okay. And how much time have you spent in
 13:09:37 **23** the Upper Midwest, sir?
 13:09:41 **24** **A.** Define "Upper Midwest." What's your
 13:09:46 **25** definition of "Upper Midwest"?

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

13:06:59 **1** **A.** Well these -- the photographs I'm referring
 13:07:02 **2** to here are the photographs taken on the day of the
 13:07:05 **3** incident.
 13:07:05 **4** **Q.** And the question you pose, then, it's a
 13:07:08 **5** thought question, a working question, I understand.
 13:07:10 **6** Why would anyone think there was snow on the river
 13:07:13 **7** when there is little snow on the ground; right?
 13:07:16 **8** **A.** That's correct.
 13:07:17 **9** **Q.** Did you get an answer to that question?
 13:07:24 **10** **A.** Well, no. I still wonder about it because
 13:07:30 **11** the -- you know, if -- if this family, these two
 13:07:35 **12** families thought that the foam piled on the river was
 13:07:38 **13** snow, it would be odd to see such a huge pile of snow
 13:07:45 **14** and not see snow anywhere else. And the other
 13:07:49 **15** photographs taken the day of the incident show small
 13:07:52 **16** patches of snow that might be maybe an inch tall, an
 13:07:58 **17** inch high, but no -- certainly no mounds of snow
 13:08:02 **18** anywhere else. So it's -- I don't know, it was just
 13:08:04 **19** hard to imagine how someone would think that the 10 to
 13:08:09 **20** 15 foot pile of white fluffy stuff would be snow.
 13:08:14 **21** **Q.** It was white --
 13:08:15 **22** Who described it as "white fluffy"?
 13:08:19 **23** **A.** Well if you think it's snow, snow is white,
 13:08:23 **24** it's not a dense material, you know, so, you know,
 13:08:27 **25** it's -- snow could be described as white and fluffy.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

13:09:47 **1** **Q.** I have the same definition as everyone who
 13:09:50 **2** lives here has.
 13:09:51 **3** **A.** Okay.
 13:09:52 **4** **Q.** North Dakota, South Dakota, Minnesota, Iowa.
 13:09:55 **5** How much time have you spent in the Upper Midwest?
 13:09:58 **6** **A.** Yeah, probably driven through Iowa.
 13:10:01 **7** **Q.** Winter, fall, spring or summer?
 13:10:03 **8** **A.** I t would have been summer.
 13:10:04 **9** **Q.** Okay. Have you spent any time at all in
 13:10:07 **10** North Dakota, South Dakota, or Minnesota in the
 13:10:11 **11** winter?
 13:10:12 **12** **A.** No.
 13:10:18 **13** **Q.** How often does it snow where your office is
 13:10:22 **14** located in San Francisco?
 13:10:25 **15** **A.** Rarely, if at all.
 13:10:29 **16** **Q.** So you're not used to seeing snow piles; is
 13:10:33 **17** that fair?
 13:10:34 **18** **A.** Well that presupposes that I've never
 13:10:37 **19** visited areas that do have snow.
 13:10:39 **20** **Q.** I just asked you if you're used to seeing
 13:10:42 **21** snow piles.
 13:10:42 **22** **A.** I have seen snow piles, yes.
 13:10:44 **23** **Q.** Okay. Where?
 13:10:46 **24** **A.** Parts of California in the Sierra that has
 13:10:51 **25** snow which I visited a number of occasions.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

157

13:26:30 **1** Q. With --

13:26:30 **2** After rendering opinion that you don't

13:26:32 **3** believe that this foam constitutes a hazard; correct?

13:26:39 **4** A. I -- I think you're mischaracterizing

13:26:41 **5** everything that I've said here.

13:26:43 **6** Q. Do you not believe that your opinion on

13:26:44 **7** whether or not that foam was covering the drop-off is

13:26:48 **8** just a tad bit influenced by the hindsight bias?

13:26:53 **9** A. Not at all.

13:26:55 **10** Q. All right. So when -- when Detective Bakke

13:26:58 **11** told you that from her standing location she can't see

13:27:01 **12** rock ledges below because they are covered by foam --

13:27:05 **13** A. I'm sorry. Say that again.

13:27:06 **14** Q. When Detective Bakke told you, according to

13:27:09 **15** your own notes, quote, from her standing location she

13:27:12 **16** can't see rock ledges below because they are covered

13:27:15 **17** by foam, end quote; did you give his statement

13:27:21 **18** credence, or disregard it?

13:27:24 **19** A. I asked a number of questions to clarify my

13:27:26 **20** understanding, because I suspected that his earlier

13:27:33 **21** description of -- of foam covering the rocks where

13:27:39 **22** Maggie was standing applied to the lower level of

13:27:45 **23** rocks and not to the top layer of rocks.

13:27:48 **24** Q. Did you write that down in your notes

13:27:50 **25** anywhere?

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

158

13:27:51 **1** A. Yes, I did. He clarified that the top layer

13:27:55 **2** of rocks were not covered by the foam.

13:28:00 **3** Q. I'm sorry. Do you have this note in front

13:28:01 **4** of you, sir?

13:28:02 **5** A. Yeah.

13:28:03 **6** Q. Can you tell me --

13:28:03 **7** A. Item number 3, the last phrase. However,

13:28:07 **8** the foam did not obscure higher ledges at top of

13:28:10 **9** canyon wall.

13:28:11 **10** Q. Did Detective Bakke call this area a canyon?

13:28:16 **11** A. I don't believe so.

13:28:16 **12** Q. Okay. That's your words.

13:28:18 **13** A. Yes.

13:28:19 **14** Q. Okay. And Detective Bakke told you that it

13:28:25 **15** did not obscure higher ledges of the rock outcropping.

13:28:31 **16** A. Yes.

13:28:32 **17** Q. Can you point to any photograph and tell me

13:28:36 **18** where -- which rock outcropping he's referring to as

13:28:40 **19** not being obscured?

13:28:42 **20** A. Yeah. In Exhibit 22 you can clearly see

13:28:48 **21** that the officer here --

13:28:49 **22** Q. No, no.

13:28:50 **23** A. -- is standing below some level of rock, and

13:28:53 **24** you can see that because you cannot see all of his

13:28:56 **25** shoes. That tells you that he is standing below some

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

159

13:28:59 **1** level of rock. You can also see that there is -- you

13:29:05 **2** know, clearly there's one -- a top layer of rock here

13:29:09 **3** at the bottom of the photograph, and then as you move

13:29:11 **4** forward in the photograph there's a drop-off of a few

13:29:15 **5** inches and there is another level of rock ledge. So

13:29:19 **6** it's a scalloped wall with several levels of

13:29:24 **7** projecting rocks that -- that create ledges.

13:29:28 **8** Q. Can you tell me where the water is in

13:29:30 **9** Exhibit Number 22?

13:29:32 **10** A. It's under the foam.

13:29:33 **11** Q. How do you know that?

13:29:35 **12** A. Because there's nowhere else that the river

13:29:37 **13** could be except in that area.

13:29:39 **14** Q. Can you tell me exactly where the foam ends

13:29:42 **15** and the river starts?

13:29:44 **16** A. That I don't know.

13:29:45 **17** Q. Because the foam is covering it; right?

13:29:49 **18** A. Well --

13:29:50 **19** Q. Isn't that correct?

13:29:55 **20** A. The -- You can also see from Exhibit 22 that

13:29:59 **21** some of the rocks are partially covered by foam but

13:30:03 **22** not completely covered by foam. Since I was not there

13:30:09 **23** then, or -- or at any time of high foam, I do -- I

13:30:18 **24** don't know how many other levels of rock ledges there

13:30:23 **25** are. I would not expect a shear drop-off there, but

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

160

13:30:29 **1** -- and there could be, you know, multiple levels, you

13:30:31 **2** know, lower down that are obstruct -- or the view of

13:30:36 **3** those are obscured by the foam or obstructed by the

13:30:39 **4** foam, so I can't tell. You can tell that there's

13:30:42 **5** rocks poking up through the foam. Exactly where the

13:30:46 **6** edge of the rock -- this particular rock ledge is and

13:30:52 **7** where the next rock ledge is, if there is one, I could

13:30:56 **8** not tell you.

13:30:58 **9** Q. Isn't it true --

13:30:59 **10** A. But I can tell you, from looking at that

13:31:01 **11** photograph, that the foam obscures some of the rocky

13:31:06 **12** ledges, which would indicate that the foam might

13:31:10 **13** obscure lower rocky ledges, and therefore appreciating

13:31:16 **14** that fact would tell anybody thinking about walking

13:31:21 **15** further out on the rocky ledges should be careful,

13:31:25 **16** because they can't really appreciate where the rock --

13:31:29 **17** lower rock ledges are because they might be obscured

13:31:32 **18** by foam, or there just might be nothing but foam and

13:31:39 **19** river under there.

13:31:55 **20** Q. So it's your testimony that the fact that

13:31:58 **21** the foam is covering something should tell someone

13:32:01 **22** that it's covering something dangerous; is that right?

13:32:06 **23** A. That the foam is incompletely covering some

13:32:10 **24** of the rocks, you can tell that from that exhibit,

13:32:14 **25** would indicate that there might be more rock under the

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

169

13:43:27 **1** A. Well, on one hand you might think that you
 13:43:34 **2** cannot have too many warnings. If there's -- If
 13:43:38 **3** someone could get injured with this product or in this
 13:43:43 **4** environment, then it could be helpful to provide a
 13:43:46 **5** warning about that. On the other hand, if you have
 13:43:51 **6** warnings about -- you know, for every situation, then
 13:43:58 **7** you can have too many warnings and people will ignore
 13:44:02 **8** all of them. So it's important to be judicious about
 13:44:08 **9** what warnings you put up.
 13:44:10 **10** Q. Haven't you in fact testified in cases where
 13:44:14 **11** you opined that it was necessary to provide a warning
 13:44:18 **12** notwithstanding the fact that the hazard at issue was
 13:44:21 **13** open and obvious?
 13:44:23 **14** A. Not that I recall.
 13:44:25 **15** Q. Do you recall testifying in the Yglesias
 13:44:28 **16** case?
 13:44:29 **17** A. Yglesias, yes.
 13:44:31 **18** Q. That yellow caution tape was needed to warn
 13:44:34 **19** Ms. Yglesias of the edge of a deck where the railing
 13:44:38 **20** had been removed?
 13:44:39 **21** A. Yeah, and that's because there's expectation
 13:44:42 **22** for a railing, and they removed the railing.
 13:44:44 **23** Q. And it wasn't open --
 13:44:45 **24** A. So this is --
 13:44:46 **25** If I could finish?

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

170

13:44:46 **1** Q. Please.
 13:44:47 **2** A. You know, so this is a deck that on that
 13:44:50 **3** side was maybe 6 to 8 feet above the ground, and so at
 13:44:56 **4** issue there, as these people were familiar with the
 13:45:02 **5** deck, they had lived there, it is common practice for
 13:45:06 **6** decks to have railings, and when you -- when you --
 13:45:16 **7** when you -- when you get in the way of those
 13:45:20 **8** expectations, when you do something that counters an
 13:45:24 **9** expectation in built environment, then you need to
 13:45:28 **10** provide a warning about it.
 13:45:29 **11** So in that case there was a railing, the
 13:45:31 **12** people who lived there knew that there was a railing,
 13:45:35 **13** and for however long I forget in that case, you know,
 13:45:43 **14** the construction folks removed the railing and that --
 13:45:49 **15** that created a hazard, and that's something that
 13:45:52 **16** should have been warned about because it countered the
 13:45:56 **17** expectation of people using the area.
 13:45:59 **18** Q. Sure. And in that case there was also a
 13:46:00 **19** piece of yellow caution tape that was placed across
 13:46:03 **20** the entrance to the deck which you opined was not
 13:46:06 **21** enough warning to tell this woman that a railing that
 13:46:10 **22** had been removed from a deck constituted a hazard.
 13:46:14 **23** A. Right, --
 13:46:14 **24** Q. True?
 13:46:15 **25** A. -- because they're two different places.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

171

13:46:18 **1** Q. Right. And --
 13:46:18 **2** A. So the explanation for that, if I can
 13:46:20 **3** finish, --
 13:46:20 **4** Q. Sure.
 13:46:21 **5** A. -- because you seem to be really interested
 13:46:23 **6** in this, is the entrance to the deck from the driveway
 13:46:26 **7** it -- is where the yellow caution tape was, but they
 13:46:30 **8** did not provide a lock on a door and so it was
 13:46:34 **9** possible to come out the front door and encounter the
 13:46:37 **10** missing railing, which is why the -- the -- you know,
 13:46:42 **11** you needed a warning, you know, at that location to
 13:46:46 **12** show that there is a missing railing here, or there's
 13:46:49 **13** -- there's something that you should pay attention to.
 13:46:52 **14** And that's why the caution tape at the entrance to the
 13:46:55 **15** deck was insufficient, because -- because they hadn't
 13:47:01 **16** addressed the -- the actual hazard, which is 20, 30
 13:47:06 **17** feet away.
 13:47:07 **18** Q. But was still in plain sight.
 13:47:10 **19** A. Well it was absence of sight. You know,
 13:47:14 **20** given the expectation for a railing, then we don't
 13:47:17 **21** notice when it's gone. You know, it takes four to 16
 13:47:23 **22** times longer to -- to notice something that is counter
 13:47:27 **23** to one's expectation than it is to notice something
 13:47:31 **24** that is consistent with your expectation.
 13:47:33 **25** Q. Even though it was at her own home.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

172

13:47:36 **1** A. Especially because it's at her own home.
 13:47:39 **2** Q. Well -- And it's -- your opinion in that
 13:47:42 **3** case has -- is consistent with your belief that one of
 13:47:46 **4** the main purposes of warnings is to inform users about
 13:47:49 **5** the presence of a hazard of which they may not be
 13:47:52 **6** aware.
 13:47:53 **7** A. Yes.
 13:47:53 **8** Q. And you continue to hold that belief;
 13:47:55 **9** correct?
 13:47:55 **10** A. Yes.
 13:47:56 **11** Q. And if a person is not aware of a hazard, a
 13:48:00 **12** warning may be called for; correct?
 13:48:02 **13** A. That's correct.
 13:48:03 **14** Q. And the warning needs to comply with certain
 13:48:05 **15** basic, fundamental principles of human-factors
 13:48:10 **16** engineering; correct?
 13:48:12 **17** A. In order to be effective, yes.
 13:48:13 **18** Q. In order to be effective; correct?
 13:48:15 **19** A. Yes.
 13:48:16 **20** Q. All right. One of which is it needs to be
 13:48:18 **21** close temporally to the hazard itself; correct?
 13:48:22 **22** A. Yes.
 13:48:22 **23** Q. And it needs to specifically warn of the
 13:48:25 **24** hazard at issue; correct?
 13:48:26 **25** A. Yes.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

13:48:26 **1** Q. In order to --

13:48:27 **2** A. If it's a hidden hazard, yes.

13:48:29 **3** Q. If it's a hidden hazard; --

13:48:31 **4** A. Right.

13:48:31 **5** Q. -- correct?

13:48:32 **6** Or if it's a hazard of which a person may

13:48:34 **7** not be aware.

13:48:35 **8** A. Which is a hidden hazard.

13:48:37 **9** Q. Right. And -- And hazards at -- sometimes

13:48:41 **10** can be open and at other times cannot; correct?

13:48:44 **11** A. I don't know what that means.

13:48:45 **12** Q. Okay. Well if you have a roller coaster

13:48:48 **13** which has part of the roller coaster at the bottom

13:48:51 **14** where the people are upside down and their legs are

13:48:54 **15** hanging down, --

13:48:54 **16** A. Right.

13:48:55 **17** Q. -- the fact that their legs are hanging down

13:48:57 **18** would be open and obvious to someone when they go --

13:49:00 **19** the roller coaster goes through that part of the

13:49:03 **20** roller coaster.

13:49:03 **21** A. If you had actually read that paper, I

13:49:06 **22** actually had maybe three or four papers about that

13:49:08 **23** same case, and it is not an obvious hazard because

13:49:13 **24** people think about roller coasters as the cars on top

13:49:17 **25** of the track, and at issue in that particular case was

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

13:50:54 **1** people who come to Falls Park during February or March

13:50:58 **2** may interpret the white foam stuff -- white stuff as

13:51:04 **3** being?

13:51:04 **4** A. Have I done any studies?

13:51:05 **5** Q. Yeah.

13:51:06 **6** A. No.

13:51:07 **7** Q. Okay. Have you done any studies to analyze

13:51:10 **8** whether or not people approach the white stuff on the

13:51:15 **9** river during the February and March months at Falls

13:51:18 **10** Park?

13:51:19 **11** A. No.

13:51:25 **12** Q. So whether or not the white stuff that

13:51:29 **13** accumulates below the falls at Falls Park every year

13:51:33 **14** in February or March con -- attracts people closer to

13:51:39 **15** the bank is not something that you've conducted any

13:51:42 **16** scientific study of; is that correct?

13:51:44 **17** A. Well I think you're mischaracterizing what I

13:51:47 **18** said about understanding this pile of white stuff as

13:51:51 **19** snow and -- and wondering how that could come about.

13:51:57 **20** So that pile of snow is -- you know, did not -- or a

13:52:02 **21** -- pile of white stuff did not occur without a

13:52:08 **22** context, and the context in this case is, at least

13:52:12 **23** from the photographs that I've seen, there were very

13:52:15 **24** few places that had any snow, and those patches of

13:52:18 **25** snow were very small. So given that, and -- and

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

13:49:21 **1** that it is an inverted roller coaster and people don't

13:49:27 **2** think about inverted roller coasters when they think

13:49:30 **3** about roller coasters, even if they've just gotten off

13:49:33 **4** of an inverted roller coaster.

13:49:35 **5** So in that case it was a nonobvious hazard

13:49:40 **6** because we -- you know, in this case the track was,

13:49:45 **7** you know, 10, 12 feet above the ground, and if you

13:49:48 **8** think about roller coasters as riding on top of the

13:49:52 **9** track, then there's no indication that one could get

13:49:55 **10** injured by walking underneath the roller coaster

13:49:58 **11** track, and therefore, a specific hazard needs to be

13:50:02 **12** provided.

13:50:03 **13** Q. Okay. Some people think roller coasters

13:50:06 **14** that people ride on top. Some people may think that

13:50:09 **15** piles of white stuff might be snow. True?

13:50:14 **16** A. I actually did research to find out how

13:50:17 **17** people think about roller coasters, so I know that 75

13:50:23 **18** percent, maybe 78 percent of the people that I

13:50:26 **19** surveyed thought about roller coaster tracks riding on

13:50:31 **20** -- I'm sorry, roller coaster trains riding on top of

13:50:34 **21** the track and not underneath, even though all of those

13:50:37 **22** people had ridden an inverted roller coaster before.

13:50:40 **23** I have not done any studies to evaluate what set of

13:50:46 **24** visual stimuli might be interpreted as snow or not.

13:50:50 **25** Q. Have you done any studies to interpret what

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

13:52:25 **1** knowing what I know about the incidence of foam

13:52:29 **2** buildup in that area and maybe some other areas of the

13:52:32 **3** river, then it's not likely that there would be -- I'm

13:52:39 **4** sorry, I'm phrasing that wrong.

13:52:41 **5** Because there was only small patches of snow

13:52:47 **6** in -- in a few places in the park according to

13:52:50 **7** photographs I've seen, it seems hard to imagine how

13:52:53 **8** someone would see a pile of white stuff and somehow

13:52:58 **9** think that was a big pile of snow. That pile of snow

13:53:01 **10** is 10 to 20 feet tall, and I don't see any other piles

13:53:04 **11** of snow anywhere else on the grounds. Why would I

13:53:08 **12** think there would be snow there? So that's my

13:53:10 **13** question.

13:53:11 **14** So questions about, you know, have I done

13:53:14 **15** any research on how people interpret a big pile of

13:53:17 **16** white stuff would not be the study that I would do, it

13:53:23 **17** would be, you know, interpreting a big pile of white

13:53:25 **18** stuff in the context of -- of very little, if any,

13:53:30 **19** snow on the ground.

13:53:33 **20** Q. Moving on.

13:53:34 **21** You take issue with Ms. Gill's opinion that

13:53:38 **22** the foam attracts children and people to the river

13:53:43 **23** bank. Is that a fair statement, that you take issue

13:53:47 **24** with that?

13:53:48 **25** A. I take issue in it that she failed to

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

13:53:50 **1** provide any evidence.

13:53:51 **2** **Q.** I just asked you a question, a very simple

13:53:54 **3** question.

13:53:54 **4** Do you take issue with it or not?

13:53:56 **5** **A.** It's not a simple question, actually.

13:53:58 **6** **Q.** Sure, it is.

13:53:59 **7** **A.** No. And she can say whatever she wants, but

13:54:04 **8** the issue that I have with that statement from Ms.

13:54:07 **9** Gill is she makes the statement without providing any

13:54:12 **10** evidence besides some anecdotal evidence.

13:54:17 **11** **Q.** Okay. Do you believe, or not believe, in

13:54:19 **12** your opinion, that the presence of foam in Falls Park

13:54:23 **13** during the months of February and March on an annual

13:54:25 **14** basis attracts people closer to the river bank?

13:54:29 **15** **A.** I have no idea if that's true or not.

13:54:32 **16** **Q.** Okay. So you have no opinion one way or

13:54:36 **17** another as to whether or not the foam acts as an-- as

13:54:39 **18** an attractant to children; is that correct?

13:54:42 **19** **A.** I'd have to go with what -- with the same

13:54:46 **20** questions posed to various city staff, park staff, and

13:54:51 **21** -- and they answer the question I don't see that the

13:54:53 **22** foam is a particular attractant, so --

13:54:57 **23** **Q.** That is --

13:54:57 **24** **A.** -- so that's -- that's the evidence that I

13:54:59 **25** have. They don't see that foam is a particular

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

13:56:00 **1** My recollection is that when the same

13:56:03 **2** question has been posed to various people, they all

13:56:05 **3** say pretty much the same thing. They don't see the

13:56:08 **4** snow as an attractant. So I did not see the need to

13:56:12 **5** belabor the point; these people thought it was an

13:56:16 **6** attractant, this person said it was an attractant, you

13:56:20 **7** know, the -- the -- from my reading of these

13:56:23 **8** statements and transcripts it seems that the bulk of

13:56:26 **9** the people, you know, the -- consider the question of

13:56:31 **10** foam as an attractant to be -- I don't know, a ques --

13:56:43 **11** What's the right word? They're surprised by the

13:56:47 **12** question. It's like, why would that question even

13:56:49 **13** come up. So -- So yeah, I didn't feel the need to

13:56:54 **14** expand on that.

13:56:55 **15** **Q.** So you didn't feel the need to provide the

13:56:57 **16** entire basis of your rebuttal to Ms. Gill?

13:57:02 **17** **A.** List all the pros and cons? No.

13:57:04 **18** **Q.** Well, no. You said that one of the reasons

13:57:06 **19** you don't agree with Ms. Gill is because city

13:57:08 **20** personnel told you they don't believe it's an

13:57:11 **21** attractant, and then you cite to one guy. If there

13:57:14 **22** are more people who told you that, don't you think you

13:57:16 **23** should tell me who those people are so I can ask them?

13:57:20 **24** **A.** Well you're -- you're -- you have the same

13:57:23 **25** information I do in terms of statements and deposition

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

13:55:03 **1** attractant at least before the 2018 incident.

13:55:07 **2** **Q.** All right.

13:55:07 **3** **A.** And, you know, that's the only information I

13:55:10 **4** have.

13:55:11 **5** **Q.** According --

13:55:11 **6** **A.** I don't have any information that it is an

13:55:15 **7** attractant or is not.

13:55:16 **8** **Q.** You have no opinion one way or another; is

13:55:19 **9** that fair?

13:55:20 **10** **A.** Sure.

13:55:20 **11** **Q.** All right. In rebutting Ms. Gill's opinion,

13:55:24 **12** you take issue with what you call her lack of

13:55:27 **13** evidence; correct?

13:55:28 **14** **A.** Yes.

13:55:28 **15** **Q.** And then you point out that Mr. Mieras

13:55:31 **16** stated that in all his time in -- with Falls Park the

13:55:34 **17** only time he has heard or seen -- seen or heard of

13:55:37 **18** children playing with the foam was the 2018 incident;

13:55:40 **19** correct?

13:55:41 **20** **A.** Yes.

13:55:41 **21** **Q.** You cite no other anecdotal evidence in your

13:55:47 **22** report for that proposition that it does not

13:55:50 **23** constitute an attractant.

13:55:53 **24** **A.** Yeah. I don't -- I guess I don't -- I think

13:55:58 **25** that the --

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

13:57:26 **1** transcripts. Ms. Gill provides -- you know, if she

13:57:31 **2** had such information you would think that it would be

13:57:33 **3** provided in her report. She goes on and on about foam

13:57:38 **4** as a hazard, but says very little about foam as an

13:57:41 **5** attractant. So that tells me there are very few

13:57:44 **6** statements about foam as an attractant, otherwise she

13:57:47 **7** would have listed them.

13:57:49 **8** **Q.** Do you know if the City of Sioux Falls

13:57:52 **9** considers the foam to attract visitors even closer to

13:57:55 **10** the edge of the river?

13:57:59 **11** **A.** Again, it's not clear to me that foam is an

13:58:03 **12** attractant, period, so.

13:58:04 **13** **Q.** I asked if -- do you know if the City of

13:58:05 **14** Sioux Falls itself, not you, --

13:58:08 **15** **A.** Umm-hmm?

13:58:08 **16** **Q.** -- but if the City of Sioux Falls considers

13:58:10 **17** the foam to be something that attracts visitors even

13:58:14 **18** closer to the edge of the water?

13:58:16 **19** **A.** Again, from my reading of these deposition

13:58:19 **20** transcripts, I would say no.

13:58:20 **21** **Q.** How about your reading of all the materials

13:58:22 **22** that were provided to you?

13:58:24 **23** **A.** The same, same answer. No.

13:58:26 **24** **Q.** You believe --

13:58:26 **25** You don't believe that the city has ever

STIREWALT & ASSOCIATES
1-800-553-1953 info@stirewalt.com

14:12:49 **1** causal factor in Maggie's death.
 14:12:51 **2** **Q.** And consequently, Ms. Jayne, who you accuse
 14:12:57 **3** of failing to adequately supervise Maggie, would be
 14:13:01 **4** the person responsible for Maggie's death; true?
 14:13:07 **5** **A.** Well, I guess I have trouble with your
 14:13:13 **6** characterization.
 14:13:14 **7** **Q.** I'm sure you do because you'd like to keep
 14:13:16 **8** it nice and sterile, wouldn't you? But the reality of
 14:13:20 **9** it is is when you say Courtney Jayne failed to
 14:13:22 **10** adequately supervise her child and she died, what
 14:13:25 **11** you're saying is she's responsible for her death.
 14:13:27 **12** Isn't that the reality here?
 14:13:31 **13** **A.** I can --
 14:13:32 **14** I can understand that, yes.
 14:13:37 **15** **Q.** That's an awfully serious thing to say;
 14:13:39 **16** isn't it, sir?
 14:13:40 **17** **A.** It is a serious matter.
 14:13:43 **18** **Q.** And it's something that you are saying in
 14:13:47 **19** your capacity as a human factors engineer and an
 14:13:53 **20** experimental psychologist; correct?
 14:13:56 **21** **A.** Yes.
 14:13:58 **22** **Q.** With no expertise in child care; correct?
 14:14:03 **23** Correct?
 14:14:03 **24** **A.** Well, I think that -- I've laid out the
 14:14:06 **25** bases for my opinions --

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:14:08 **1** **Q.** And you've said you're not an expert in
 14:14:10 **2** child care.
 14:14:10 **3** **A.** -- and monitoring children is part of child
 14:14:13 **4** care.
 14:14:15 **5** **Q.** You would want to be extremely careful and
 14:14:19 **6** thorough before you make the kind of charge that a
 14:14:22 **7** parent is responsible for their own child's death;
 14:14:25 **8** true?
 14:14:26 **9** **A.** Yes.
 14:14:30 **10** **Q.** It'd be a terrible thing to say that about a
 14:14:33 **11** parent and then find out you're wrong; wouldn't it?
 14:14:37 **12** **A.** Yes.
 14:14:40 **13** **Q.** You know, if you're wrong about this you
 14:14:42 **14** know what happens to you; nothing? Do you know what
 14:14:45 **15** happens to her? Do you?
 14:14:51 **16** **A.** I can imagine it would be a terrible thing.
 14:14:53 **17** **Q.** Tell me what you think happens to her if you
 14:14:55 **18** are wrong in your accusation that she's responsible
 14:14:58 **19** for her own child's death.
 14:15:00 **20** **A.** I think this is beyond the scope of my
 14:15:03 **21** expertise.
 14:15:07 **22** **Q.** I'd assume you'd want to make sure you've
 14:15:09 **23** looked at all the available evidence before you make
 14:15:11 **24** that kind of accusation; true?
 14:15:14 **25** **A.** I have.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:15:15 **1** **Q.** And you have looked at all the available
 14:15:17 **2** evidence.
 14:15:17 **3** **A.** Yes.
 14:15:19 **4** **Q.** And I'd assume you'd want to reach that kind
 14:15:22 **5** of opinion based on sound facts, sound science and
 14:15:28 **6** sound experience and expertise; correct?
 14:15:32 **7** **A.** Yes.
 14:15:35 **8** **Q.** One of the facts that you base your opinion
 14:15:38 **9** on is by observation you made while you were at Falls
 14:15:41 **10** Park on June 11, 2019; correct?
 14:15:45 **11** **A.** Yes.
 14:15:46 **12** **Q.** And during that time you state you observed
 14:15:50 **13** groups with young children to determine how closely
 14:15:53 **14** the accompanying adults monitored the children;
 14:15:58 **15** correct?
 14:15:59 **16** **A.** Yes, and how close --
 14:15:59 **17** **Q.** And you photo --
 14:16:00 **18** **A.** -- the children got to the river.
 14:16:02 **19** **Q.** And you photographed the young children that
 14:16:05 **20** you observed; correct?
 14:16:06 **21** **A.** Yes.
 14:16:06 **22** **Q.** Did you get permission to photograph
 14:16:08 **23** children at Falls Park?
 14:16:09 **24** **A.** I did not.
 14:16:10 **25** **Q.** All right. Did you ask their parents if it

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:16:13 **1** was okay if you took photographs of minors?
 14:16:15 **2** **A.** I did not.
 14:16:16 **3** **Q.** And you observed eight different groups with
 14:16:19 **4** 26 children; correct?
 14:16:21 **5** **A.** If that's what I wrote, yes.
 14:16:22 **6** **Q.** That's what you wrote.
 14:16:23 **7** **A.** Okay.
 14:16:23 **8** **Q.** And that's one of the bases of your opinion;
 14:16:26 **9** is it not?
 14:16:27 **10** **A.** Yes.
 14:16:27 **11** **Q.** Your observations. One of the factual
 14:16:29 **12** underpinnings of this accusation you make; isn't it?
 14:16:31 **13** **A.** One of them, yes.
 14:16:32 **14** **Q.** All right. And I want you to answer a few
 14:16:36 **15** questions, preferably directly.
 14:16:39 **16** The 26 children; how old were they?
 14:16:44 **17** **A.** Well it's difficult to --
 14:16:45 **18** **Q.** You don't know; do you?
 14:16:46 **19** **A.** -- determine, but from observation they
 14:16:49 **20** appeared to be as young as maybe three or four, and as
 14:16:53 **21** old as maybe 10-ish, maybe 12.
 14:16:56 **22** **Q.** How close did you get to the children?
 14:17:03 **23** **A.** Well the closest was pro --
 14:17:05 **24** Yeah. I have no idea.
 14:17:05 **25** **Q.** You were --

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:17:06 **1** A. Maybe a hundred or a couple hundred feet
 14:17:09 **2** away.
 14:17:10 **3** Q. -- a couple hundred feet away maybe. You
 14:17:12 **4** were far enough away that you couldn't tell whether or
 14:17:14 **5** not these adults were giving verbal instructions to
 14:17:18 **6** the children; were you?
 14:17:19 **7** A. That's correct.
 14:17:20 **8** Q. Isn't it true that verbal instructions can
 14:17:22 **9** be an adequate form of supervision of a child?
 14:17:27 **10** A. It can be.
 14:17:28 **11** Q. Isn't that what the law of South Dakota
 14:17:29 **12** says?
 14:17:30 **13** A. I don't know.
 14:17:31 **14** Q. You never bothered to look; did you?
 14:17:34 **15** A. It's not within my domain of expertise.
 14:17:36 **16** Q. Isn't it true that the law of the State of
 14:17:39 **17** South Dakota permits daycare centers to utilize vocal
 14:17:42 **18** or verbal instruction as a part of adequate
 14:17:45 **19** supervision, sir?
 14:17:50 **20** A. Yes --
 14:17:50 **21** Q. Okay.
 14:17:51 **22** A. -- verbal instruction is certainly one way
 14:17:53 **23** to monitor.
 14:17:55 **24** Q. All right.
 14:17:56 **25** A. And it appeared as if some of the adults in
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:17:59 **1** the -- in the scenes that I saw were using verbal --
 14:17:59 **2** Q. You wrote --
 14:18:06 **3** A. -- instructions as a way to monitor their
 14:18:09 **4** children.
 14:18:10 **5** Q. You're saying it appears that it did?
 14:18:11 **6** A. Yes.
 14:18:12 **7** Q. You wrote, quote, given my distance from the
 14:18:14 **8** groups I could not determine whether the adults used
 14:18:17 **9** verbal -- used vocal instruction to keep the children
 14:18:20 **10** close to them and away from the river, or whether the
 14:18:22 **11** children had already learned to maintain a safe
 14:18:25 **12** distance from the river.
 14:18:26 **13** A. That's right.
 14:18:27 **14** Q. Okay. Now you're telling me it appeared to
 14:18:29 **15** you that they were using vocal instructions.
 14:18:32 **16** A. Yeah. One of the exhibits in my report
 14:18:34 **17** shows a pair of adults who are on a wall above where
 14:18:38 **18** their child was standing, or was playing, and there
 14:18:43 **19** was multiple looks back and forth, some kind of
 14:18:46 **20** exchange was going on.
 14:18:47 **21** Q. That's not what you bothered to write,
 14:18:49 **22** though; is it?
 14:18:49 **23** A. Well --
 14:18:51 **24** Q. You wrote specifically you couldn't tell if
 14:18:54 **25** they were using vocal instructions.
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:18:56 **1** A. I think it's irrelevant because in all the
 14:18:58 **2** cases the children were staying away from the river,
 14:19:01 **3** however that came about, and the -- and the adults
 14:19:05 **4** were staying close to the children, however that came
 14:19:08 **5** about. So whether they are -- they were doing --
 14:19:12 **6** having verbal interactions or not is irrelevant
 14:19:17 **7** because the behavior shows the children stayed away
 14:19:20 **8** from the river.
 14:19:21 **9** Q. You went to Falls Park in June when there
 14:19:27 **10** was no foam; right?
 14:19:30 **11** A. Not piles of foam.
 14:19:31 **12** Q. There was no foam in piles below the river;
 14:19:34 **13** correct?
 14:19:34 **14** A. Right. There were -- There was --
 14:19:36 **15** Q. You've already tes --
 14:19:38 **16** A. -- foam gathered in nooks and crannies along
 14:19:41 **17** some parts of the river.
 14:19:42 **18** Q. You've already testified that the conditions
 14:19:44 **19** that existed when you were there were not
 14:19:46 **20** substantially similar to what existed on March 18,
 14:19:49 **21** 2018, and you agree that the conditions were not
 14:19:54 **22** substantially similar.
 14:19:55 **23** A. The conditions in terms of the foam and the
 14:19:59 **24** snow.
 14:19:59 **25** Q. And you saw eight groups of 26 children, you
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:20:03 **1** don't know their ages; correct? You don't --
 14:20:06 **2** A. I can estimate their ages.
 14:20:07 **3** Q. Do you know where they were from?
 14:20:09 **4** A. I do not.
 14:20:10 **5** Q. Do you know whether they were with
 14:20:13 **6** parents --
 14:20:13 **7** A. I do not.
 14:20:14 **8** Q. -- or child care people?
 14:20:15 **9** A. I do not.
 14:20:16 **10** Q. Or daycare people?
 14:20:17 **11** A. That's why I was I think careful to say the
 14:20:20 **12** adults that were accompanying the child -- children.
 14:20:23 **13** Q. Okay. Do you know if they'd been to the
 14:20:24 **14** park before?
 14:20:25 **15** A. I do not.
 14:20:26 **16** Q. Do you know if they'd been to --
 14:20:29 **17** Do you know if they knew how to swim?
 14:20:30 **18** A. I do not.
 14:20:32 **19** Q. Do you know anything at all about these
 14:20:36 **20** children?
 14:20:39 **21** A. Nothing other than what I captured in the
 14:20:41 **22** photographs.
 14:20:41 **23** Q. Or the adults. Do you know anything at all
 14:20:47 **24** about the adults who were there?
 14:20:49 **25** A. Other than what was captured in the
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:20:50 **1** photographs, no.

14:20:51 **2** **Q.** Are you going to testify in open court under

14:20:54 **3** oath that you considered this to be a valid scientific

14:20:58 **4** study of some sort?

14:21:01 **5** **A.** I did not present this as a scientific

14:21:04 **6** study.

14:21:04 **7** **Q.** This is --

14:21:05 **8** **A.** I presented this as a demonstration of

14:21:08 **9** behavior of adults and children in the park on the day

14:21:13 **10** that I was there and was able to observe.

14:21:17 **11** **Q.** Nowhere in your --

14:21:18 **12** **A.** I don't think I've ever said that this was a

14:21:20 **13** empirical study. But as a demonstration I think -- I

14:21:24 **14** think that it's -- if I were to do statistical

14:21:28 **15** analyses -- I know that if I were to do like a

14:21:34 **16** Chi-Square test on the data, I would find that there

14:21:39 **17** was -- have significant findings of children staying

14:21:42 **18** away from the river.

14:21:43 **19** **Q.** Well you didn't do that before you accused

14:21:45 **20** Courtney Jayne of being responsible for her child's

14:21:47 **21** death; did you?

14:21:48 **22** **A.** No need to because I've done Chi-Squared --

14:21:51 **23** **Q.** And you didn't --

14:21:51 **24** **A.** If I could finish.

14:21:53 **25** Because I've done Chi-Square tests, I know

STIREWALT & ASSOCIATES

1-800-553-1953 info@stirewalt.com

14:23:07 **1** **Q.** Three or four or maybe five?

14:23:09 **2** **A.** More likely even less than three.

14:23:12 **3** **Q.** Or six?

14:23:12 **4** **A.** They were quite close, which is --

14:23:15 **5** **Q.** Did you measure them?

14:23:15 **6** **A.** You know, if you keep --

14:23:16 **7** Stop interrupting me and maybe I can finish

14:23:18 **8** the sentence.

14:23:19 **9** But you can determine, by looking at the

14:23:20 **10** photographs, that all the -- that each child had an

14:23:24 **11** adult that was close, you know, within arm's distance

14:23:29 **12** or within taking one step.

14:23:32 **13** **Q.** You say most of the time there was an adult

14:23:34 **14** positioned between the young child and the river.

14:23:37 **15** **A.** Yes.

14:23:38 **16** **Q.** That would, by implication, mean that some

14:23:42 **17** of the times there was not.

14:23:45 **18** **A.** And -- which --

14:23:49 **19** Which does not mean that the adult was not

14:23:51 **20** monitoring the child, it means that the adult might

14:23:54 **21** have been on the other side of the child from the

14:23:57 **22** river, but within reach.

14:23:59 **23** **Q.** So when you wrote, most of the time there

14:24:01 **24** was an adult positioned between the young child and

14:24:03 **25** the river, --

STIREWALT & ASSOCIATES

1-800-553-1953 info@stirewalt.com

14:21:55 **1** that if you have zero instances of an event with 26 --

14:22:01 **2** zero instances of a frequency of one event out of the

14:22:05 **3** possible, you know, 26 in this case, then I would find

14:22:11 **4** a statistical significance using a Chi-Square test.

14:22:15 **5** **Q.** Do you really think a first-year student at

14:22:18 **6** Santa Cruz in this experimental psychology department

14:22:21 **7** could get away with calling this some sort of valid

14:22:25 **8** test to -- to evidence a theory, as basis for

14:22:32 **9** establishing a theory or hypothesis? Is that what

14:22:35 **10** you're going to say in court?

14:22:37 **11** **A.** Again, I've never represented that this --

14:22:40 **12** this observational study was something maybe, you

14:22:45 **13** know, worthy of publication.

14:22:46 **14** **Q.** You did not --

14:22:47 **15** **A.** It shows --

14:22:48 **16** **Q.** -- call this --

14:22:49 **17** **A.** -- that of the 26 children there, none of

14:22:52 **18** them walked within 10 feet of the river.

14:22:55 **19** **Q.** What you --

14:22:56 **20** What you observed was at least one adult was

14:22:59 **21** no more than a few feet from each younger child;

14:23:02 **22** right?

14:23:02 **23** **A.** Yes.

14:23:03 **24** **Q.** What's "a few feet"?

14:23:06 **25** **A.** Three or four feet.

STIREWALT & ASSOCIATES

1-800-553-1953 info@stirewalt.com

14:24:04 **1** **A.** Yes?

14:24:04 **2** **Q.** -- you knew full well that some of the time

14:24:06 **3** there was not an adult positioned between the young

14:24:09 **4** child and the river. Why didn't you just write that?

14:24:11 **5** **A.** Well the -- I think the context of that

14:24:14 **6** sentence, if I could have my binder back.

14:24:16 **7** Where did that go?

14:24:20 **8** **Q.** It's in your report.

14:24:21 **9** **A.** Oh, here it is.

14:24:22 **10** **Q.** I just want to know why you didn't write

14:24:24 **11** that?

14:24:25 **12** **A.** I'd like to see the context. Where are you

14:24:26 **13** reading from?

14:24:27 **14** **Q.** I'm reading from your report on page 13.

14:24:39 **15** **A.** (Witness reviewing exhibit.) All right. So

14:24:49 **16** subsection d.ii, "All of the children were closely

14:24:55 **17** monitored in that at least one adult was no more than

14:24:59 **18** a few feet from each younger child." And what that

14:25:03 **19** means is within reach or within a one-step distance.

14:25:08 **20** Most of the time -- Of those times when there was a

14:25:14 **21** proximate adult, most of the time that adult was

14:25:17 **22** between the child and the river. That does not mean

14:25:19 **23** most of the time there was an adult between the child

14:25:22 **24** and the river and the other time there was not an

14:25:24 **25** adult monitoring the child. All of the time there was

STIREWALT & ASSOCIATES

1-800-553-1953 info@stirewalt.com

205

14:30:16 **1** think that was snow, given the context. So, for
 14:30:22 **2** example, the -- the river's a river, it doesn't --
 14:30:26 **3** that river could not be anywhere else except where it
 14:30:31 **4** was. You know, they walked up to the river, did not
 14:30:34 **5** encounter a river, so it had to be a river there, not
 14:30:38 **6** a big field where someone might pile up snow, so --
 14:30:44 **7** you know, so that doesn't make sense to me either.
 14:30:50 **8** **Q.** It probably doesn't make sense sitting in a
 14:30:52 **9** conference room in Minnesota, may make sense when
 14:30:55 **10** you're out at Sioux Falls with a number of kids.
 14:31:01 **11** I want to ask you about your opinion with
 14:31:05 **12** respect to the distance of Crissy Melendez and -- when
 14:31:13 **13** she took this photograph -- a photograph. If you turn
 14:31:16 **14** to page 12 of your report, you state: "During the
 14:31:30 **15** site visit, I used my camera to adjust my view to
 14:31:33 **16** match the view shown in both photos of the children
 14:31:36 **17** taken by Ms. Melendez." The "exercise indicated that
 14:31:41 **18** Ms. Melendez was probably standing about 40 feet from
 14:31:44 **19** the river edge, rather than 10 to 15 feet."
 14:31:48 **20** Did I read that correctly?
 14:31:50 **21** **A.** Yes.
 14:31:58 **22** **Q.** Melendez Exhibit Number 4 is one of those
 14:32:01 **23** photographs; correct?
 14:32:01 **24** **A.** Yes.
 14:32:03 **25** **Q.** Melendez Exhibit Number 5 is one of those
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

206

14:32:07 **1** photographs; correct?
 14:32:07 **2** **A.** Yes.
 14:32:13 **3** **Q.** Tell me again exactly how you made the
 14:32:15 **4** determination that they were 40 feet away?
 14:32:19 **5** **A.** I started at the river edge with my camera,
 14:32:25 **6** it's a single-lens reflex camera, and attempted to
 14:32:34 **7** frame the view. And I started with -- I started with
 14:32:41 **8** the photo with Jeremy in it and tried to reproduce --
 14:32:46 **9** or capture everything that can be seen in Melendez
 14:32:51 **10** number 5 and see that in my viewfinder.
 14:32:58 **11** **Q.** Okay.
 14:32:59 **12** **A.** And I kept moving side to side and
 14:33:02 **13** eventually back until I was at a location that
 14:33:07 **14** reproduced everything in my viewfinder that was shown
 14:33:12 **15** in this photograph. Once I was in that location I
 14:33:16 **16** tried to put myself in a location that also captured
 14:33:21 **17** what could be seen in the photograph of the two girls,
 14:33:25 **18** which is Melendez Exhibit Number 4, and when I found
 14:33:31 **19** that then I confirmed that I was able to reproduce
 14:33:35 **20** what I could see in the Jeremy photo number 5, and was
 14:33:41 **21** finally able to find a spot on the rock where I could
 14:33:46 **22** capture what's shown in both photographs, Exhibit 4
 14:33:52 **23** and Exhibit 5, in my viewfinder.
 14:33:56 **24** **Q.** Okay. So are you familiar with the term
 14:34:02 **25** photogrammetry?
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

207

14:34:05 **1** **A.** Photogrammetry?
 14:34:07 **2** **Q.** Yes.
 14:34:07 **3** **A.** Yes.
 14:34:08 **4** **Q.** And that's the science of making reliable
 14:34:11 **5** measurements by use of photographs; correct?
 14:34:14 **6** **A.** The science of estimating measurements by
 14:34:19 **7** using photographs.
 14:34:21 **8** **Q.** What's your background in that field?
 14:34:27 **9** **A.** I have done photogram metric analyses of
 14:34:30 **10** photographs using measurements of a known o -- or
 14:34:36 **11** known measurements of an object in the photograph and
 14:34:38 **12** then extrapolating two objects in the same plane to
 14:34:46 **13** determine or to estimate measurements for a second
 14:34:50 **14** object in that photograph. I've also used a software
 14:34:54 **15** program called PhotoModeler which does the same thing
 14:35:00 **16** in a much quicker, easier way as long as you have
 14:35:06 **17** measurements of other features in the scene.
 14:35:13 **18** **Q.** Did you use PhotoModeler in this instance?
 14:35:16 **19** **A.** No.
 14:35:17 **20** **Q.** Did you have any known measurements to
 14:35:20 **21** utilize in this instance?
 14:35:23 **22** **A.** I just --
 14:35:23 **23** As I said, I -- I used the method as des --
 14:35:28 **24** as I described.
 14:35:29 **25** **Q.** What was your error rate regarding the
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

208

14:35:31 **1** 40-foot measurement; plus or minus in feet?
 14:35:38 **2** **A.** Yeah, maybe plus or minus a foot or two.
 14:35:41 **3** **Q.** What method did you use to come up with the
 14:35:44 **4** 40-foot measurement?
 14:35:45 **5** **A.** A tape measure.
 14:35:46 **6** **Q.** Okay. What kind of camera was -- did Ms.
 14:35:48 **7** Melendez use?
 14:35:49 **8** **A.** She had a cell phone, if I remember
 14:35:51 **9** correctly.
 14:35:51 **10** **Q.** What kind?
 14:35:52 **11** **A.** I don't know.
 14:35:53 **12** **Q.** What was the focal length?
 14:35:55 **13** **A.** I don't know.
 14:35:56 **14** **Q.** What was the type of zoom she was using, if
 14:35:58 **15** at all?
 14:35:59 **16** **A.** I don't know.
 14:35:59 **17** **Q.** Was she zoomed?
 14:36:01 **18** **A.** I don't know.
 14:36:03 **19** **Q.** Was it digital?
 14:36:04 **20** **A.** I don't know. I assume so.
 14:36:08 **21** **Q.** Does it make a difference if it's digital or
 14:36:09 **22** optical?
 14:36:11 **23** **A.** No.
 14:36:14 **24** **Q.** What type of --
 14:36:15 **25** Did you use a camera to take photos to
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:40:32 **1** Jeremy says.
 14:40:34 **2** **Q.** Ms. Melendez testified, according to you,
 14:40:38 **3** that Maggie was nowhere near Jeremy; is that correct?
 14:40:42 **4** **A.** Who?
 14:40:45 **5** **Q.** Ms. Melendez.
 14:40:47 **6** **A.** That's my recollection of her testimony,
 14:40:49 **7** yes.
 14:40:49 **8** **Q.** What did Ms. Jayne say?
 14:40:51 **9** **A.** She did not know.
 14:40:52 **10** **Q.** And it's your testimony that Jeremy said
 14:40:54 **11** that Maggie was six feet away from him?
 14:40:56 **12** **A.** That's what he --
 14:40:57 **13** That's what is written in the police report,
 14:40:59 **14** that she was six to eight feet away.
 14:41:01 **15** **Q.** Okay. And in your --
 14:41:09 **16** Do you have an opinion whether or not it
 14:41:10 **17** would have been appropriate to let Jeremy be in the
 14:41:15 **18** position he's shown in that photograph with Maggie
 14:41:18 **19** being six feet away if he was monitoring her?
 14:41:31 **20** **A.** No. As a adult caregiver, I don't think it
 14:41:36 **21** would be responsible to have a 14 year old monitor the
 14:41:40 **22** behavior of a five year old.
 14:41:46 **23** **Q.** These are two of the other kids --
 14:41:49 **24** **A.** Yes.
 14:41:49 **25** **Q.** -- in Exhibit 4.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:43:04 **1** **A.** I do not have an opinion.
 14:43:06 **2** **Q.** Okay. This warning, which is I think over
 14:43:13 **3** here.
 14:43:16 **4** Here's the warning sign. I just want to ask
 14:43:20 **5** you some questions about this. It -- This warning
 14:43:31 **6** sign, or caution -- it says "CAUTION"; correct?
 14:43:35 **7** **A.** Yes.
 14:43:38 **8** **Q.** It does not say "warning" anywhere on it;
 14:43:40 **9** correct?
 14:43:41 **10** **A.** That's correct.
 14:43:51 **11** **Q.** This sign depicted in Exhibit 19 does not
 14:43:55 **12** comply with ANSI Z-35; does it?
 14:44:00 **13** **A.** Well as indicated in my report, it would be
 14:44:05 **14** -- comply with the earlier versions of ANSI Z535 I
 14:44:11 **15** think before 2002. It does not comply with recent --
 14:44:16 **16** the most recent version of ANSI Z535 which is issued
 14:44:20 **17** in 2011.
 14:44:22 **18** **Q.** So as of 2013 this sign did not comply with
 14:44:29 **19** the applicable ANSI standard; correct?
 14:44:32 **20** **A.** That's correct.
 14:44:33 **21** **Q.** As of 2018 this sign did not comply with the
 14:44:36 **22** applicable ANSI standard; correct?
 14:44:39 **23** **A.** That's correct.
 14:44:40 **24** **Q.** ANSI sets the standard by which the adequacy
 14:44:43 **25** of signs is judged; true?

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:41:50 **1** **A.** Yes.
 14:41:52 **2** **Q.** Inadequate supervision again by mom and mom?
 14:41:56 **3** **A.** Eleven and 12 year olds have good motor
 14:41:58 **4** skills, they're able to recognize perceived hazards.
 14:42:03 **5** **Q.** Were there any 11 and 12 year olds or older
 14:42:06 **6** in this group of 28 you looked at in June?
 14:42:09 **7** **A.** I think I said some might be as old as 11 or
 14:42:12 **8** 12.
 14:42:13 **9** **Q.** So they don't need their parents to be
 14:42:15 **10** monitoring them.
 14:42:15 **11** **A.** And yet they were.
 14:42:17 **12** **Q.** Okay. Well they could have just been
 14:42:19 **13** talking to them; couldn't they?
 14:42:20 **14** **A.** Well the monitor is -- is a behavioral
 14:42:23 **15** measure, it's proximity, and -- and it's taking, you
 14:42:31 **16** know, some actions, you know, that indicate, you know,
 14:42:34 **17** physical control like, you know, holding their hand or
 14:42:38 **18** carrying the child. So those are things that are
 14:42:40 **19** readily observed in the physical world.
 14:42:47 **20** **Q.** The state of South Dakota allows a daycare
 14:42:49 **21** provider to supervise the outdoor activities of a
 14:42:53 **22** child 3 years or older if the daycare provider's
 14:42:57 **23** inside, as long as they're in line of sight. You
 14:43:01 **24** think that's inadequate supervision; do you have an
 14:43:04 **25** opinion?

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:44:46 **1** **A.** No.
 14:44:47 **2** **Q.** That's the gold standard for what
 14:44:49 **3** constitutes an appropriate caution or warning sign.
 14:44:53 **4** **A.** No.
 14:44:55 **5** **Q.** Have you ever testified before that a sign
 14:45:02 **6** -- a warning sign ought comply with the applicable
 14:45:04 **7** ANSI standard?
 14:45:05 **8** **A.** Yes.
 14:45:08 **9** **Q.** Why did you testify to that?
 14:45:15 **10** **A.** Because the ANSI Z535 standard is an attempt
 14:45:21 **11** to provide consistency in warning signs, and the
 14:45:29 **12** sections of that standard are based on human factors
 14:45:33 **13** research.
 14:45:35 **14** **Q.** Okay. It's based on --
 14:45:37 **15** **A.** So the --
 14:45:38 **16** **Q.** I'm sorry. I thought you were finished.
 14:45:40 **17** **A.** So it's possible to -- you know, let's see.
 14:45:45 **18** So the ANSI Z535 standards apply really to
 14:45:51 **19** the format of a warning but says very little about the
 14:46:01 **20** content other than, you know, that there should be a
 14:46:06 **21** signal word, a description of the hazard, instruction
 14:46:09 **22** and consequence statements. That's the extent to
 14:46:13 **23** which the ANSI Z535 standard applies. It -- Because
 14:46:21 **24** it does not go into much detail about the content for
 14:46:27 **25** warnings, it would be possible to have a warning that

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:46:30 **1** complies with the ANSI Z535 standard but not be an
 14:46:36 **2** effective warning.
 14:46:39 **3** **Q.** To be clear, you have testified previously
 14:46:43 **4** that a warning sign needs to comply with the
 14:46:50 **5** applicable ANSI standard; correct? In prior cases.
 14:46:58 **6** **A.** "Needs" to comply. Yes, because of the
 14:47:02 **7** formatting requirements.
 14:47:03 **8** **Q.** Okay. And you've written about that as
 14:47:05 **9** well; correct?
 14:47:05 **10** **A.** Yes. That's the -- the minimum standard for
 14:47:08 **11** a warning.
 14:47:09 **12** **Q.** Correct. This sign, Exhibit 19, doesn't
 14:47:13 **13** meet the minimum standard for warning; correct?
 14:47:16 **14** **A.** I didn't say that. It's -- It's not
 14:47:19 **15** compliant with the recent standards, but it's con --
 14:47:24 **16** it's compliant with the pre-2002 standard. And in my
 14:47:30 **17** report I walk through how the pre-2002 and the 2011
 14:47:36 **18** standards are different in terms of the color choice,
 14:47:43 **19** you know, for backgrounds, and in terms of the
 14:47:46 **20** formatting of the signal word and its background, and
 14:47:49 **21** in terms of pictorials, and in terms of the inclusion
 14:47:55 **22** of hazard instruction and consequence statements. So
 14:48:00 **23** those pieces of the warning are described in the
 14:48:07 **24** pre-2002 standard and the 2011 standard.
 14:48:12 **25** So one of the ways that this sign is not
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:48:15 **1** consistent with the 2011 standard is the formatting of
 14:48:23 **2** the signal word. So I think it's Exhibit R of my
 14:48:30 **3** report shows the older standard and the newer
 14:48:35 **4** standard. So there's not a whole lot of difference,
 14:48:39 **5** so I could not say that the two -- pre-2002 standard,
 14:48:46 **6** the format would be any more or any less effective
 14:48:50 **7** than the 2011 standard. You know, both standards ask
 14:48:54 **8** for a signal word, you know, the difference is the --
 14:48:59 **9** you know, the -- I guess the extra clutter in the
 14:49:01 **10** background for the signal word in the pre-2002
 14:49:04 **11** standard, and the difference is als -- and so that
 14:49:12 **12** extra clutter most likely would not have much, if any,
 14:49:18 **13** effect on how people would notice, read, understand or
 14:49:23 **14** follow a warning. The second difference is the
 14:49:27 **15** addition of the exclamation mark and the warning
 14:49:32 **16** triangle in the 2011 standard. That symbol can be
 14:49:41 **17** important in providing -- you know, encouraging
 14:49:46 **18** somebody to notice it, but research has shown that
 14:49:50 **19** people don't pay that much attention to the
 14:49:53 **20** exclamation mark and the triangle. So -- So in
 14:50:00 **21** effect, the differences in format between, you know,
 14:50:04 **22** the pre-2002 ANSI Z535 standard and the 2011 standard
 14:50:09 **23** is quite minimum -- minimal, and so this warning that
 14:50:16 **24** was shown and displayed in Falls Park is close --
 14:50:22 **25** [coughing] -- excuse me, closer to the two thousand --
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:50:26 **1** pre-2002 standard, but just because it doesn't comply
 14:50:29 **2** with the 2011 standard, it has all the pieces that
 14:50:33 **3** would make it an effective warning.
 14:50:36 **4** **Q.** Does this sign comply with the ANSI standard
 14:50:41 **5** that was in effect as of March 18, 2018 or not?
 14:50:47 **6** **A.** As I said, it does not.
 14:50:49 **7** **Q.** The ANSI standard sets the generally
 14:50:52 **8** accepted protocol for evaluating prospective warning
 14:50:56 **9** symbols and signs; true?
 14:51:00 **10** **A.** It provides one methodology for evaluating
 14:51:04 **11** symbols.
 14:51:04 **12** **Q.** And it's the methodology that's accepted
 14:51:07 **13** within the field of human-factors engineering;
 14:51:11 **14** correct?
 14:51:12 **15** **A.** Sure.
 14:51:15 **16** **Q.** It --
 14:51:15 **17** The ANSI standard incorporates generally
 14:51:18 **18** accepted human-factors engineering techniques and
 14:51:21 **19** beliefs; correct?
 14:51:22 **20** **A.** I'm sorry. Ask that again.
 14:51:23 **21** **Q.** The ANSI standard incorporates generally
 14:51:26 **22** accepted human-factors engineering techniques;
 14:51:30 **23** correct?
 14:51:31 **24** **A.** "Techniques."
 14:51:32 **25** **Q.** Beliefs? Principles?
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

14:51:36 **1** **A.** As I said, the ANSI Z535 standards are based
 14:51:40 **2** on human-factors research on what makes an effective
 14:51:44 **3** warning, so -- so -- so the ANSI standards have
 14:51:49 **4** incorporated some of those things, such as use of a
 14:51:52 **5** signal word, use of pictorials, when to use block
 14:52:00 **6** capital letters and when to use mixed case, font size,
 14:52:04 **7** a number of things, you know, all based on
 14:52:07 **8** human-factors research.
 14:52:08 **9** **Q.** All right. Let me rephrase that.
 14:52:10 **10** The ANSI standard, ANSI Z-35, incorporates
 14:52:14 **11** generally accepted human-factors engineering
 14:52:16 **12** principles; correct?
 14:52:22 **13** **A.** You know, again, "principles." You know --
 14:52:28 **14** You know, I'm sure Ms. Gill wrote these questions for
 14:52:30 **15** you, but they just don't make sense. So it -- As I've
 14:52:36 **16** said, the ANSI Z535 standards are based on
 14:52:39 **17** human-factors research, it's data that has come from
 14:52:45 **18** doing -- conducting empirical research with what is
 14:52:48 **19** noticeable, what makes a display noticeable, what
 14:52:51 **20** makes text readable, understandable, based on research
 14:52:57 **21** that shows which of these components provided in one
 14:53:03 **22** piece are most likely to result in people following
 14:53:07 **23** these warnings. So a human-factors principle might be
 14:53:14 **24** true in that a human-factors principle might be
 14:53:18 **25** something like, you know, provide a list of items in a
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

<p style="text-align: center;">221</p> <p>14:53:23 1 bullet format as opposed to one block text. ANSI Z535</p> <p>14:53:30 2 certainly recommends that.</p> <p>14:53:31 3 Q. Is it your --</p> <p>14:53:32 4 Are you done?</p> <p>14:53:34 5 A. So --</p> <p>14:53:34 6 But so yes, there might be some</p> <p>14:53:37 7 human-factors principles that are incorporated in the</p> <p>14:53:40 8 ANSI Z535 standards, but as a blanket statement, you</p> <p>14:53:44 9 know, it somehow incorporates all human-factors</p> <p>14:53:48 10 principles is just not accurate or correct in any way.</p> <p>14:53:52 11 Q. How far was the closest warning sign or</p> <p>14:53:56 12 caution sign to the area where Maggie went in the</p> <p>14:54:01 13 water; how many feet?</p> <p>14:54:35 14 A. (Witness reviewing documents.) Well the</p> <p>14:54:39 15 closest sign was maybe -- maybe a hundred feet, --</p> <p>14:54:39 16 Q. Did you meas --</p> <p>14:54:52 17 A. -- maybe a little bit more.</p> <p>14:54:53 18 Q. Did you measure it?</p> <p>14:54:55 19 A. In the past I've measured the width of the</p> <p>14:54:58 20 -- Oh, actually, no, maybe more like 50 or 60 feet. I</p> <p>14:55:03 21 measured the -- using a Google aerial photo, measured</p> <p>14:55:09 22 the distance from the area where Maggie fell to the</p> <p>14:55:14 23 sidewalk, and that was about a hundred feet.</p> <p>14:55:18 24 Q. Okay.</p> <p>14:55:19 25 A. So the closest sign to where Maggie fell was</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>	<p style="text-align: center;">223</p> <p>14:56:45 1 means in this situation.</p> <p>14:56:47 2 Q. Isn't it true that the river -- the</p> <p>14:56:50 3 characteristics of the area around the river differ</p> <p>14:56:54 4 markedly a mile, two miles, three miles down river</p> <p>14:56:57 5 than it does in this urban park setting?</p> <p>14:57:00 6 A. I have not been to any other parts of the</p> <p>14:57:02 7 river.</p> <p>14:57:03 8 Q. Okay. So again, warnings are most effective</p> <p>14:57:07 9 when they're placed at the time and location where a</p> <p>14:57:10 10 person needs it; right?</p> <p>14:57:11 11 A. If you need a warning, then yes, --</p> <p>14:57:11 12 Q. Okay.</p> <p>14:57:13 13 A. -- that is true. You need to place it --</p> <p>14:57:15 14 Q. Right.</p> <p>14:57:17 15 A. -- at time and location.</p> <p>14:57:19 16 Q. I just need to know if you are of the</p> <p>14:57:20 17 opinion that having the closest warning sign to the</p> <p>14:57:24 18 area where Maggie fell in being 60-some feet away was</p> <p>14:57:31 19 or was not sufficiently close in terms of location to</p> <p>14:57:38 20 make it effective.</p> <p>14:57:42 21 A. In this situation 60 feet could be close</p> <p>14:57:51 22 enough. Now the problem with this particular warning</p> <p>14:57:54 23 sign is it's oriented in such a way that if you're</p> <p>14:57:57 24 standing where Maggie fell you would not be able to</p> <p>14:58:00 25 see this sign, you know, so, you know, we're talking</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>
<p style="text-align: center;">222</p> <p>14:55:24 1 at the intersection of the sidewalk and the pedestrian</p> <p>14:55:28 2 bridge, so that might be, you know, maybe 60 or 70</p> <p>14:55:32 3 feet.</p> <p>14:55:32 4 Q. Have you measured it?</p> <p>14:55:35 5 A. Eyeballing it from --</p> <p>14:55:37 6 Q. From an aerial photograph?</p> <p>14:55:39 7 A. Yes.</p> <p>14:55:39 8 Q. Okay.</p> <p>14:55:40 9 A. Based on my previous measurement of 100 feet</p> <p>14:55:43 10 from the river's edge to the sidewalk.</p> <p>14:55:45 11 Q. Do you agree with the proposition that</p> <p>14:55:48 12 warnings are most effective when they're placed at the</p> <p>14:55:51 13 time and location where a person needs it?</p> <p>14:55:53 14 A. I do.</p> <p>14:55:53 15 Q. And is it your opinion that your estimate of</p> <p>14:55:57 16 60 feet from the closest sign to the point where</p> <p>14:56:00 17 Maggie fell in was a -- was sufficiently close to the</p> <p>14:56:06 18 location where she fell in to constitute an effective</p> <p>14:56:10 19 warning?</p> <p>14:56:13 20 A. Well, you know, "close" in this case would</p> <p>14:56:25 21 be placing warning signs along this particular edge of</p> <p>14:56:29 22 the river maybe every 50 feet. Maybe having three</p> <p>14:56:34 23 signs along the edge of the river in this location,</p> <p>14:56:39 24 which means that you want to do the same thing along</p> <p>14:56:42 25 the entire river on both sides. That's what "close"</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>	<p style="text-align: center;">224</p> <p>14:58:03 1 about not just distance, but we're also talking about</p> <p>14:58:07 2 orientation in terms of what would make a warning more</p> <p>14:58:10 3 effective. So in this situation if you wanted a -- if</p> <p>14:58:16 4 you -- if you thought there was a need for a warning</p> <p>14:58:19 5 sign then you want to place it in places where people</p> <p>14:58:23 6 would see it before they go wandering off the</p> <p>14:58:27 7 sidewalks and to the edge of the river.</p> <p>14:58:30 8 Q. So if I understand you correctly, if we</p> <p>14:58:34 9 assume for a moment that a warning was needed, the</p> <p>14:58:39 10 warning sign needed to be more proximate to the area</p> <p>14:58:42 11 of the fall than it was lo -- than where it was</p> <p>14:58:47 12 located on the day of the incident. Is that a fair</p> <p>14:58:50 13 statement, sir?</p> <p>14:58:51 14 A. Well --</p> <p>14:58:54 15 And I'm saying no, not necessarily.</p> <p>14:58:56 16 Q. Oh.</p> <p>14:58:57 17 A. Because proximate to the --</p> <p>14:58:59 18 Well, one, you say proximate to the area of</p> <p>14:59:02 19 the fall presumes that you can anticipate where people</p> <p>14:59:05 20 will fall off the edge of the -- of the canyon wall,</p> <p>14:59:10 21 and -- which means then that anywhere that there is a</p> <p>14:59:14 22 cliff where someone could fall off of you need a</p> <p>14:59:18 23 warning every few feet to make sure that people</p> <p>14:59:23 24 approaching this area would see it here, because if</p> <p>14:59:28 25 they're over there they might not see it over there</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>

<p style="text-align: right;">225</p> <p>14:59:30 1 ten feet over, twenty feet over, so then you need</p> <p>14:59:34 2 warning signs along the river, everywhere along the</p> <p>14:59:37 3 river, which is, I think, an untenable position. So</p> <p>14:59:42 4 better positioned would be to provide warning signs in</p> <p>14:59:49 5 areas before [coughing] -- before people are about to</p> <p>14:59:56 6 go off the sidewalk and -- and wander across the grass</p> <p>15:00:00 7 or -- or along -- towards the river's edge. And that</p> <p>15:00:05 8 might be several different locations, but not</p> <p>15:00:07 9 necessarily, you know, near the actual hazard. There</p> <p>15:00:15 10 where you would need a warning is when they make the</p> <p>15:00:19 11 decision to leave the sidewalk and go to the river,</p> <p>15:00:22 12 then you would want a warning at that place, which</p> <p>15:00:24 13 could be far away, it might be a hundred feet. So --</p> <p>15:00:31 14 And it might be closer, it depends on where that</p> <p>15:00:34 15 sidewalk is. But it's that decision point that people</p> <p>15:00:36 16 need to be warned about the hazard of the cliff if in</p> <p>15:00:42 17 fact there's a need to warn about the hazard of the</p> <p>15:00:44 18 cliff.</p> <p>15:00:45 19 Q. You are highly trained in human factors;</p> <p>15:00:49 20 true?</p> <p>15:00:50 21 A. Yes.</p> <p>15:00:51 22 Q. You're familiar with basic precepts,</p> <p>15:00:54 23 research and principles of human factors?</p> <p>15:00:57 24 A. Yes.</p> <p>15:00:58 25 Q. Does this sign comply with basic research</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>	<p style="text-align: right;">227</p> <p>15:02:25 1 statement that "no swimming, you could drown,"</p> <p>15:02:29 2 "turbulent water, you could drown." That explicit</p> <p>15:02:32 3 statement is not needed because it's understood in the</p> <p>15:02:36 4 pictorial.</p> <p>15:02:37 5 Q. Okay.</p> <p>15:02:38 6 A. The same with the slippery rocks. "Slippery</p> <p>15:02:40 7 rocks, you might fall," that's not needed to say "stay</p> <p>15:02:46 8 off the rocks" or "keep off the rocks."</p> <p>15:02:48 9 Q. Isn't it a basic principle of human factors</p> <p>15:02:53 10 that a warning needs to describe the specific nature</p> <p>15:02:56 11 of the hazard, the consequences, and how to comply in</p> <p>15:02:59 12 order for it to be even remotely considered effective?</p> <p>15:03:04 13 A. No, I would not agree with that just based</p> <p>15:03:07 14 on the research I just told you about.</p> <p>15:03:09 15 Q. Would you agree that to increase the</p> <p>15:03:10 16 probability of compliance with a warning, a warning</p> <p>15:03:13 17 should explicitly describe the consequences of failing</p> <p>15:03:16 18 to heed the warning?</p> <p>15:03:18 19 A. Again, the instruction and consequence</p> <p>15:03:21 20 statements are not needed if they are -- if they are</p> <p>15:03:27 21 redundant with other information that's in the</p> <p>15:03:29 22 warning.</p> <p>15:03:30 23 Q. Do you agree with the statement that people</p> <p>15:03:31 24 are less likely to understand or comply with a hazard</p> <p>15:03:34 25 if they do not know what it is?</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>
<p style="text-align: right;">226</p> <p>15:01:00 1 and principles of human factors as to what constitutes</p> <p>15:01:03 2 an effective warning with respect to the items that it</p> <p>15:01:07 3 warns of?</p> <p>15:01:09 4 A. Yes, as I said in my report.</p> <p>15:01:11 5 Q. It does.</p> <p>15:01:12 6 A. Yes.</p> <p>15:01:13 7 Q. Notwithstanding the fact that it does not</p> <p>15:01:15 8 comply with ANSI; correct?</p> <p>15:01:17 9 A. Well, as I said, it complies with an older</p> <p>15:01:20 10 version of ANSI Z535, and the differences between the</p> <p>15:01:27 11 pre-2002 and the 2011 are insignificant formatting</p> <p>15:01:31 12 issues and not something that would significantly</p> <p>15:01:35 13 affect the effectiveness of the sign.</p> <p>15:01:38 14 Q. And notwithstanding the fact that it does</p> <p>15:01:40 15 not contain explicit warnings and instructions on how</p> <p>15:01:44 16 to avoid the warnings, or avoid the hazard?</p> <p>15:01:47 17 A. Well as I said in my report, there's</p> <p>15:01:50 18 research that indicates that redundant information can</p> <p>15:01:54 19 be omitted from a warning without decreasing --</p> <p>15:01:59 20 without substantially decreasing the effectiveness of</p> <p>15:02:01 21 the warning. So in this case, you know, an explicit</p> <p>15:02:05 22 warning might be "stay off the rocks," no -- and I</p> <p>15:02:12 23 guess "no swimming in turbulent water." They both</p> <p>15:02:15 24 imply that there's a drowning hazard based -- just</p> <p>15:02:22 25 based on the pictorials. You don't need an explicit</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>	<p style="text-align: right;">228</p> <p>15:03:38 1 A. Yeah, that's certainly true.</p> <p>15:03:44 2 Q. Do you agree with the statement that to</p> <p>15:03:46 3 increase the probability of compliance with a warning,</p> <p>15:03:48 4 warnings should provide brief and explicit</p> <p>15:03:50 5 instructions on how to comply?</p> <p>15:03:55 6 A. If the information is not already provided,</p> <p>15:03:58 7 then a brief and explicit instruction statement is</p> <p>15:04:02 8 necessary.</p> <p>15:04:04 9 THE WITNESS: And I'm going to get some</p> <p>15:04:06 10 water.</p> <p>15:04:38 11 (Discussion off the stenographic</p> <p>15:04:38 12 record.)</p> <p>15:04:51 13 BY MR. SIEFF:</p> <p>15:04:51 14 Q. Do you agree that in an area where drowning</p> <p>15:04:55 15 is a hazard, that the action warning of "caution" is</p> <p>15:05:04 16 appropriate?</p> <p>15:05:07 17 A. I'm sorry. Ask that again.</p> <p>15:05:08 18 Q. Sure.</p> <p>15:05:09 19 In an area where the hazard of drowning is</p> <p>15:05:13 20 present, do you agree that the action word of</p> <p>15:05:21 21 "caution" is appropriate, or should it be something</p> <p>15:05:23 22 stronger?</p> <p>15:05:30 23 A. Yes, it should be something stronger.</p> <p>15:05:32 24 "Danger" would be a better signal word here than</p> <p>15:05:35 25 "caution."</p> <p style="text-align: center;">STIREWALT & ASSOCIATES</p> <p style="text-align: center;">1-800-553-1953 info@stirewalt.com</p>

15:05:35 **1** Q. All right. So you do agree that at least as
 15:05:38 **2** far as the signal word, you are critical of the use of
 15:05:42 **3** the term "caution."
 15:05:43 **4** A. Yes. "Danger" would be a much better word.
 15:05:45 **5** Q. And you are critical of the coloring on this
 15:05:48 **6** sign; are you not?
 15:05:51 **7** A. Well if -- if -- if the signal word were
 15:05:58 **8** "danger" and we wanted to be -- to comply with Z535,
 15:06:02 **9** then the background for the signal word would be red,
 15:06:05 **10** and red is -- more readily denotes or connotes hazard
 15:06:11 **11** than yellow.
 15:06:12 **12** Q. You still do research and writing and things
 15:06:16 **13** like that and some work outside of the litigation
 15:06:22 **14** field. Have you ever, in your career, recommended to
 15:06:25 **15** a client use of a non-ANSI-compliant warning or
 15:06:30 **16** caution sign?
 15:06:32 **17** A. No.
 15:06:33 **18** Q. Would you ever recommend to a client use of
 15:06:37 **19** a non-ANSI-compliant sign?
 15:06:40 **20** A. No.
 15:06:43 **21** Q. Have you done any testing to determine
 15:06:48 **22** whether or not the warning sign at issue that's in
 15:06:51 **23** front of you has achieved compliance or noncompliance?
 15:06:59 **24** If you understand my question?
 15:07:01 **25** A. Yes, and I've not done any study to evaluate
 STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

230

15:07:04 **1** that, but as I describe in my report, it has the
 15:07:10 **2** effectiveness -- it has the components of an effective
 15:07:13 **3** warning, and most likely would be noticed, read,
 15:07:15 **4** understood and followed.
 15:07:16 **5** Q. And you --
 15:07:17 **6** So you believe that it's an effective
 15:07:19 **7** warning sign?
 15:07:21 **8** A. Yes.
 15:07:23 **9** Q. Achieving compliance?
 15:07:27 **10** A. Well you rarely get a hundred percent
 15:07:31 **11** compliance, so it's, you know --
 15:07:34 **12** MR. SIEFF: Can you mark that for me?
 15:07:37 **13** A. -- the research literature would -- you
 15:07:42 **14** know, shows, you know, sometimes you get a hundred
 15:07:44 **15** percent compliance with a good sign, and sometimes
 15:07:46 **16** maybe more like 60 percent. So as the -- you know,
 15:07:54 **17** there are a number of factors that go into whether
 15:07:58 **18** someone will follow a sign or not. Formatting is just
 15:08:02 **19** one of those factors in the Z535 standard, and this
 15:08:08 **20** standard just addresses formatting issues, but this
 15:08:13 **21** component -- I'm sorry. This warning sign has
 15:08:15 **22** components of an effective sign that could achieve,
 15:08:22 **23** you know, significant amounts of compliance.
 15:08:25 **24** Q. Okay. You're familiar with the safety
 15:08:27 **25** hierarchy.

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

15:08:27 **1** A. Yes.
 15:08:29 **2** Q. The first tier of the safety hierarchy is to
 15:08:32 **3** design out a hazard; correct?
 15:08:33 **4** A. Yes.
 15:08:34 **5** Q. The next one's to guard against a hazard;
 15:08:37 **6** correct?
 15:08:37 **7** A. Yes.
 15:08:38 **8** Q. And the third and the least effective is to
 15:08:40 **9** warn against a hazard; correct?
 15:08:42 **10** A. Yes.
 15:08:42 **11** Q. In this instance I think it would -- you
 15:08:44 **12** would agree with me that it'd be very difficult to
 15:08:47 **13** design out the hazard of the rushing water, the rocks
 15:08:50 **14** and the foam.
 15:08:51 **15** A. Yes.
 15:08:55 **16** Q. Let's talk about guarding against it. Are
 15:08:57 **17** you aware of anything that would have prevented the
 15:08:59 **18** city from using temporary fencing in the area where
 15:09:03 **19** Maggie fell during high foam season?
 15:09:06 **20** A. No.
 15:09:07 **21** Q. Are you aware of anything that would have
 15:09:08 **22** prevented the city from utilizing something along the
 15:09:13 **23** lines of LED lighting like you might see on a road
 15:09:17 **24** warning of road construction, in the area where Maggie
 15:09:20 **25** fell during high flood season?

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com

232

15:09:23 **1** A. Am I aware of anything that might prevent
 15:09:25 **2** them from doing that?
 15:09:26 **3** Q. Yeah.
 15:09:26 **4** A. No. They can do whatever they want, so.
 15:09:28 **5** Q. I'm just asking you if you are aware of
 15:09:30 **6** anything that prevented them.
 15:09:32 **7** A. Well -- and placing warnings, and fencing,
 15:09:39 **8** barricades and, you know, a variable messages sign
 15:09:41 **9** which is a warning, you have to take into a number of
 15:09:45 **10** factors. And yes, you could put variable messaging
 15:09:53 **11** signs up all over the park if you wanted to. I don't
 15:09:56 **12** think it would be a very pleasant place to visit. So
 15:09:59 **13** if I were designing this, I would not recommend
 15:10:02 **14** putting up variable messaging signs in this park.
 15:10:07 **15** Q. Knowing that we've had a number of drownings
 15:10:10 **16** at least alleged to have been caused due to the
 15:10:13 **17** presence of high foam during the foam runoff, the
 15:10:17 **18** spring runoff, do you think it would be prudent to do
 15:10:21 **19** -- to take any other action of any type or kind
 15:10:29 **20** relative to the accumulation of foam at Falls Park?
 15:10:33 **21** Whether it be additional warnings, or barricades, or
 15:10:37 **22** guarding, or an Observation Tower or deck or anything
 15:10:41 **23** of the sort?
 15:10:47 **24** A. As I've said multiple times, I don't
 15:10:49 **25** consider the foam to be a hazard that's independent of

STIREWALT & ASSOCIATES
 1-800-553-1953 info@stirewalt.com